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# Analysis

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## Unreasonable Mistake in Self-Defence: *Lieser v HM Advocate*

Until recently, there was little doubt over the position of Scots law in relation to an unreasonable mistake in self-defence. As *Owens v HM Advocate*<sup>1</sup> made clear, the defence of self-defence is available only where any mistake made by the accused about the existence of an imminent attack is a reasonable one.<sup>2</sup> The requirement for mistakes to be reasonable remained intact even after *Jamieson v HM Advocate*,<sup>3</sup> where Scots law followed English law in accepting that an honest but unreasonable belief in consent can ground an acquittal on a charge of rape.<sup>4</sup> In *Jamieson*, it was stressed by the court that this principle was not to be extended to defences:<sup>5</sup>

We wish to say that we are not to be taken . . . as casting any doubt on the soundness of the dicta in [*Owens*]. Nor are we to be taken as suggesting that in any other case, where a substantive defence is based on a belief which is mistaken, there need not be reasonable grounds for that belief.

What appeared to be a settled line of authority was, however, unexpectedly called into question by the Full Bench decision of *Drury v HM Advocate*.<sup>6</sup> Although the direct concern of *Drury* was provocation,<sup>7</sup> the court also turned its attention to the relationship between defences and the *mens rea* of murder. According to the then Lord Justice-General (Rodger), the latter was not, as had previously been assumed, a simple intention to kill (or the alternative of wicked recklessness).<sup>8</sup> Rather it was a *wicked* intention to do so, where the term “wickedness” referred to the absence of provocation or any other applicable defence.<sup>9</sup>

1 1946 JC 119.

2 See also Hume, *Commentaries* i, 244; *Crawford v HM Advocate* 1950 JC 67 at 72; *McLean v Jessop* 1989 SCCR 13 at 17; *Jones v HM Advocate* 1990 JC 160 at 172; *Burns v HM Advocate* 1995 JC 154 at 159.

3 1994 JC 88.

4 This is no longer the position in England and Wales: see Sexual Offences Act 2003 s 1(1)(c). It is unlikely to remain the position in Scotland either: see Sexual Offences (Scotland) Bill s 1(1)(b), as introduced 17 June 2008.

5 At 93.

6 2001 SLT 1013.

7 In particular the correct test to be applied in cases of provocation by infidelity. For discussion, see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 10.09.

8 J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5<sup>th</sup> edn, by J Walker and D J Stevenson (1948) 89.

9 Para 11.

It did not take long for commentators to point out the potential consequences of this decision for the law relating to mistaken belief in self-defence.<sup>10</sup> If murder requires a wicked intention, then it is open to the accused who believes genuinely, albeit unreasonably, that he is acting in self-defence to argue that his intention lacked the necessary quality of wickedness, and thus he should not be convicted of murder. Indeed, it was feared that the court's analysis of the *mens rea* of murder could open up the way to all sorts of previously unrecognised defences, on the basis that the accused did not act with a wicked intent.<sup>11</sup>

The High Court had the opportunity to revisit its analysis in another Full Bench decision, *Gillon v HM Advocate*,<sup>12</sup> the focus of which was also provocation. But despite the barrage of academic criticism that followed *Drury*,<sup>13</sup> it chose to leave the *Drury* analysis of murder untouched, stating that "we have no reason to disagree with [the Lord Justice-General's] approach to the underlying *mens rea* involved in murder and culpable homicide, as it relates to a plea of provocation".<sup>14</sup>

Against this background, it was only a matter of time before a case arose in which the appellant attempted to argue on the basis of *Drury* that an unreasonable mistake in self-defence should ground an acquittal. That case has now materialised in *Lieser v HM Advocate*.<sup>15</sup>

#### A. LIESER v HM ADVOCATE

The appellant in *Lieser* was convicted of murder, despite arguing at his trial that he acted in self-defence in what he accepted was the mistaken belief that the deceased was about to attack him with a knife. The trial judge had, in line with *Owens*, directed the jury that any such mistake must be a reasonable one. On appeal it was argued that this was a misdirection, given the *mens rea* for murder set out in *Drury* and, in particular, the requirement for "wickedness", even when the accused intended to kill.<sup>16</sup>

The court's response to this argument was swiftly to reject it. In delivering the opinion of the court, Lord Kingarth surveyed the authorities on mistaken belief in self-defence and concluded that there was "binding authority" to the effect that "a person who claims that he acted in self-defence because he believed that he was

10 F Leverick, "Mistake in self-defence after *Drury*" 2002 JR 35; J Chalmers, "Collapsing the structure of criminal law" 2001 SLT (News) 241.

11 M G A Christie, "The coherence of Scots criminal law: some aspects of *Drury v HM Advocate*" 2002 JR 273; V Tadros, "The Scots law of murder", in J Horder (ed), *Homicide Law in Comparative Perspective* (2007) 190-192.

12 2007 JC 24.

13 Aside from those sources already noted (nn 10-11), see V Tadros, *Criminal Responsibility* (2005) 104; P R Ferguson, "Codifying criminal law (1): a critique of Scots criminal law" [2004] Crim LR 49 at 52; C H W Gane, C N Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law*, 3<sup>rd</sup> edn (2001) para 10.21.

14 Para 24. See J Chalmers and F Leverick, "Murder through the looking glass: *Gillon v HM Advocate*" (2007) 11 EdinLR 230.

15 [2008] HCJAC 42, 2008 SLT 866.

16 Para 5.

in imminent danger must have had reasonable grounds for this belief”.<sup>17</sup> As for the impact of *Drury*, there is “nothing in the opinions delivered in that case which casts doubt on those earlier authorities”.<sup>18</sup> It is true, Lord Kingarth stated, that at least four members of the *Drury* court regarded self-defence as “relating to the primary question of whether the accused could be said to have had *mens rea* for murder, in particular whether he could be said to have acted with the necessary wickedness” rather than “falling to be considered separately as ... a defence”.<sup>19</sup> This did not, however, mean that the court in *Drury* “envisaged any alteration to the requirement that any genuine but mistaken belief in violence offered must be based on reasonable grounds”.<sup>20</sup> Rather, the necessary wickedness would be lacking *only* if the accused fulfilled the existing requirements of the defence, which included the requirement that any mistaken belief be a reasonable one.

## B. DISCUSSION

With respect, and contrary to the statement made in *Lieser*, there is plenty in the opinions delivered in *Drury* that “casts doubt on [the] earlier authorities”. It was made quite clear in *Drury* that defences such as self-defence are to be regarded not as substantive defences in their own right, but as factors that operate to negate *mens rea*.<sup>21</sup> If this is so, then the argument made in *Jamieson* that self-defence contains a reasonableness requirement because it is a “substantive defence” no longer applies, as it seems that self-defence is not a substantive defence at all. In *Jamieson*, it was also said that “[t]he reason why, in rape cases, the man’s belief need not be shown to be based on reasonable grounds for his belief to be relevant as a ground of acquittal is because of the particular nature of the *mens rea* which is required to commit the crime”.<sup>22</sup> In *Drury*, Lord Rodger made it clear that the *mens rea* of murder, wicked intention, is to be determined with reference to the accused’s motive:<sup>23</sup>

Saying that the perpetrator “wickedly” intends to kill is just a shorthand way of referring to what Hume (i, 254) describes as the murderer’s “wicked and mischievous purpose”, in contradistinction to “those motives of necessity, duty, or allowable infirmity, which may serve to justify or excuse” the deliberate taking of life.

The accused who kills in the honest but unreasonable belief that he is acting in self-defence has exactly the same motive as the accused whose belief is reasonable. He uses violence with the purpose of repelling what he believes to be an attack upon his person. Lord Kingarth is almost certainly right that the court in *Drury* did not

<sup>17</sup> Para 7. The appellant made a similar argument in respect of provocation (at para 5), which was also rejected by the court.

<sup>18</sup> Para 11.

<sup>19</sup> Para 11.

<sup>20</sup> Para 11.

<sup>21</sup> For a convincing contrary argument in favour of maintaining a conceptual distinction between offences and defences, see R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) ch 9.

<sup>22</sup> *Jamieson v HM Advocate* 1994 JC 88 at 93.

<sup>23</sup> *Drury v HM Advocate* 2001 SLT 1013 at para 11.

envisage any alternation to the law on mistaken belief in self-defence. Nonetheless, the logical conclusion to be drawn from their analysis is that the unreasonably mistaken accused does not act with a wicked purpose and therefore does not have the *mens rea* for murder.<sup>24</sup> The manner in which the court in *Lieser* has escaped this conclusion—by deeming that the accused who intends to kill in the belief that his life is in danger is “wicked” only if his belief is unreasonable—is awkward at best.

That said, regardless of the route by which it arrived there, the court’s decision in *Lieser* is the morally appropriate one. In acting upon an unreasonable belief in an imminent attack, the accused displays a lack of respect and concern for the life or bodily integrity of another.<sup>25</sup> He has killed or injured someone who, in reality, posed no threat whatsoever or gave any reason to suppose he was doing so. As Fletcher put it, to allow unreasonable mistaken belief in self-defence is to “sanction thoughtless, negligent over-reaction” when instead, “the lack of restraint, the indulgence, the failure to discipline one’s reactions . . . are all grounds for blaming the person who claims his wrongdoing is excused”.<sup>26</sup> To permit an unreasonable mistake to ground the defence of self-defence may have the result, for example, of allowing the defence to a racist who shoots a black man, after interpreting his request for money as a potentially lethal threat, based on the honest but unreasonable belief that this particular racial group are uncontrollably violent.<sup>27</sup> Such a provision may even be incompatible with the ECHR.<sup>28</sup>

### C. CONCLUSION

In conclusion, the court in *Lieser* is to be applauded for arriving at the right result. Faced with a similar issue of interpretation, the Court of Appeal in England and Wales chose to reach the more logical conclusion that an unreasonable mistake in the existence of an attack must be capable of establishing the defence of self-defence.<sup>29</sup> While the appeal court’s logic in *Lieser* is open to criticism, the result it has arrived at is the preferable one. Those concerned with the conceptual clarity of the criminal law may simply have to accept that the blurring of the distinction between offences and defences in *Drury* is now firmly entrenched in Scots law, at least in relation to

24 This is not the conclusion reached recently by P W Ferguson in “Reasonable mistakes” 2008 SCL 971, but for criticism of Ferguson’s analysis, see J Chalmers, “*Lieser* and misconceptions” 2008 SCL 1115.

25 Duff, *Answering for Crime* (n 21) 294; F Leverick, *Killing in Self-Defence* (2006) 165-168.

26 G P Fletcher, “The psychotic aggressor: a generation later” (1993) 27 *Israel Law Review* 227 at 241. For the counter-argument, see R Singer, “The resurgence of *mens rea*: II—honest but unreasonable mistake of fact in self defense” (1986-1987) 28 *Boston College Law Review* 459 at 512.

27 See *People v Goetz* 497 NE 2d 41 (1986), discussed at length in G P Fletcher, *A Crime of Self-Defense: Bernard Goetz and the Law on Trial* (1988). For further examples, see C K Y Lee, “Race and self-defense: towards a normative conception of reasonableness” (1996) 81 *Minnesota Law Review* 367.

28 Space restrictions do not permit elaboration of this argument here, but see Leverick, *Killing in Self-Defence* (n 25) ch 10. Cf J C Smith, “The use of force in public or private defence and Article 2” [2002] Crim LR 958.

29 *R v Williams* [1987] 3 All ER 411. See also the Privy Council in *R v Beckford* [1988] AC 130.

murder.<sup>30</sup> In *Gillon* and *Lieser*, the appeal court has had two opportunities to retreat but has chosen to remain faithful to its original analysis.

That said, we may not have heard the last of this issue. Based in part on the academic criticism that followed *Drury*, the Scottish Law Commission announced in 2005 that it intended to examine the defences of self-defence, provocation, necessity and coercion.<sup>31</sup> But since then it has received a reference from the Scottish Ministers inviting it to look at Crown appeals, double jeopardy, bad character evidence and the *Moorov* doctrine.<sup>32</sup> Given that, at the time of writing, only the first of these had resulted in a report,<sup>33</sup> any review of self-defence may be some time in coming.

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## More Heat than Light from *Anwar*

The laws of contempt of court are most often tested by the acts of parties or of the media, but in *Anwar, Respondent*<sup>1</sup> the activities and publications at issue were those of a Scottish solicitor. Aamer Anwar is no ordinary solicitor: his counsel described him as a specialist in human rights law, a campaigner against injustice, and a political activist, in explanation (or perhaps extenuation) of his conduct.

Mr Anwar had been the panel's solicitor when Mohammed Atif Siddique was tried at the High Court in Glasgow on charges under the Terrorism Acts 2000 and 2006. In brief, the charges were for possession of materials for the purpose of terrorism. On 17 September 2007 the jury found Siddique guilty of two charges unanimously, and on two charges by a majority. A few weeks later, in Edinburgh, Siddique was sentenced to imprisonment for a total period of eight years. He has been granted leave to appeal.

Following the return of the jury's verdicts on 17 September, Mr Anwar read a statement outside the court building in the presence of members of the public, journalists and television cameramen. A press release was issued by him contemporaneously. Later that day, Mr Anwar gave a television interview, shown on the BBC's *Newsnight Scotland*.

<sup>30</sup> In *Lord Advocate's Reference (No 1 of 2000)* 2001 JC 143, on the other hand, it was stated that a successful plea of necessity does not negate any "malice" in the *mens rea* of malicious mischief but is to be regarded as a defence in its own right (at para 30).

<sup>31</sup> *Seventh Programme of Law Reform* (Scot Law Com No 198, 2005) para 2.48.

<sup>32</sup> *Annual Report 2007* (Scot Law Com No 211, 2008) 8.

<sup>33</sup> Report on *Crown Appeals* (Scot Law Com No 212, 2008).

<sup>1</sup> [2008] HCJAC 36, 2008 SLT 710.

Remarks on these three occasions led to the subsequent remission by the Siddique trial judge (Lord Carloway) to a High Court bench of the issue of a possible contempt of court on the part of Mr Anwar. The oral statement was almost identical to the terms of the press release, and responses to the television interviewer essentially repeated some of the same sentiments. Amongst the remarks, it was said that “Mohammed Atif Siddique was found guilty of doing what millions of young people do every day, looking for answers on the internet”. Another claim was that “this verdict is a tragedy for justice and for freedom of speech and undermines the values that separate us from the terrorist. . .”. Part of the evidence led against the accused was described as “farcical”. And it was said that “the prosecution was driven by the State, with no limit to the money and resources used to secure a conviction in this case, carried out in an atmosphere of hostility after the Glasgow Airport attack. . . In the end Atif Siddique did not receive a fair trial. . .”<sup>2</sup>

In Mr Anwar’s defence, it was said that the press release statements were made on instructions from his client, as an affidavit vouched for. However, any attempted distancing was apt to be undermined by, amongst other things, the fact that the first quotation from or attribution of views to the client came in the eighth paragraph (out of nine) of the press release. As the judges quite reasonably observed, if comments were intended to represent nothing more than the client’s views, “that can and should be made absolutely clear” and “in this case it was not”.<sup>3</sup>

So questions of authorisation and authorship were elided, and the task for the High Court (Lord Osborne, who delivered the opinion, sitting with Lord Kingarth and Lord Wheatley) was to decide whether the statements were contemptuous.

#### A. THE SCOPE OF CONTEMPT

Contempt has been called “the Proteus of the legal world” in the light of its prodigious variety of forms.<sup>4</sup> In passing, we might notice that as the precincts and purview of courts are ill defined, a speech given on the steps of a court building might not be impossible to treat as a direct contempt of the kind described in English law as “contempt in the face of the court”.<sup>5</sup> Another possibility would involve consideration of whether Mr Anwar’s publications carried risks of prejudice to active proceedings, as defined in the Contempt of Court Act 1981: under those provisions, criminal proceedings are active until concluded “by acquittal or, as the case may be, by sentence”.<sup>6</sup> In the television interview, the respondent replied to a question about the potential sentence rather obliquely, mainly by saying that society was asking the

<sup>2</sup> Para 2.

<sup>3</sup> Para 45.

<sup>4</sup> J Moskowitz, “Contempt of injunctions, civil and criminal” (1943) 43 *Columbia Law Review* 780.

<sup>5</sup> In one case Lord Denning MR clearly envisaged that this form of contempt could extend to conduct outside the court building: *Balogh v St Albans Crown Court* [1975] QB 73 at 84.

<sup>6</sup> Contempt of Court Act 1981 s 2, Sch 1. The point seems to have been overlooked (perhaps wilfully) by many commentators and lawyers who regarded the proceedings as concluded by the verdict.

wrong question about young Muslims. The court said that it could not regard the remarks as an interference with the remaining stages.<sup>7</sup>

Thirdly and perhaps most obviously, the content and manner of the statements could be considered under the heading known in English law as “scandalising the court” and sometime in Scotland as “murmuring judges”. Lord Osborne and his brethren avoided both archaisms, preferring simply to adopt the umbrella definition that the Lord Justice Clerk (Gill) had pronounced only a few months earlier, in *Robertson and Gough v HM Advocate*:<sup>8</sup>

Contempt of court is constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself, whether in civil or criminal proceedings.

The judges’ disinclination to classify further may have been influenced by the potential relevance of or proximity to several forms of contempt; their reluctance to elucidate may simply have been a reversion to a calculated style of adjudication which, unhelpfully for students of the law, does little more than answer the questions asked.

## B. CONTEMPT AND FREEDOM OF SPEECH

The court did, however, confirm that it remained possible to conceive of language so extreme that it did indeed challenge or affront the authority of the court or the supremacy of the law, whether or not it related to particular, unconcluded proceedings.<sup>9</sup> The possibility may sit rather uneasily with expansive notions of freedom of speech, and under its Constitution the category is not tolerated in the United States, where Mr Justice Frankfurter memorably disparaged it as the “English foolishness”.<sup>10</sup> The pressure group Liberty which, innovatively for the Scottish courts,<sup>11</sup> was permitted to make submissions in a way analogous to that enabled by the third party intervention procedure in England and Wales, was anxious to question whether any sanction could be imposed on the respondent in these circumstances consistently with article 10 of the European Convention on Human Rights. Some politicians and celebrities who had offered public support to Mr Anwar treated the views expressed as being essentially political speech and criticised what they saw as the victimisation of a radical lawyer.

Be that as it may, article 10(2) specifically identifies the maintenance of “the authority and impartiality of the judiciary” as a legitimate aim, as everyone was reminded by the advocate depute for the Crown, who sought only to correct any deficiencies in presentation of the law to the court. The court did not delve far

<sup>7</sup> *Anwar* at para 43.

<sup>8</sup> 2008 JC 146 at para 29.

<sup>9</sup> At para 37.

<sup>10</sup> *Bridges v California* 314 US 252 at 287 (1941).

<sup>11</sup> See P Marshall, “Liberty to intervene beyond judicial review” 2008 SLT (News) 187. As skilfully argued by David Sheldon, appearing for Liberty, the *sui generis* nature of contempt allowed the court to regard an intervener as competent.



into Strasbourg case law, being readily satisfied on the relevance of the phrase from scholarly writing<sup>12</sup> as well as a leading case.<sup>13</sup> The insertion of the phrase in the Convention has been traced to British influence and the implication sometimes made is that contempt of court laws are (in both senses) peculiarly British. However, the implication is rather misleading, because there are many other countries where either specific or more general laws are available to deal with attacks on the judiciary or the administration of justice.<sup>14</sup>

Yet, if the “scandalising” type of contempt remains extant and its potential to “chill” endures, instances of its use are rare. In Britain, a penalty was last applied by an English court in 1931,<sup>15</sup> and last by a Scottish court in 1870.<sup>16</sup> In 1946, in rejecting a finding that a Land Court appellant had committed contempt by way of criticisms in a letter, the Lord President (Normand) in *Milburn, Appellant* had observed that:<sup>17</sup>

The greatest restraint and discretion should be used by the court in dealing with contempt of court, lest a process, the purpose of which is to prevent interference with the administration of justice, should degenerate into an oppressive or vindictive use of the court’s powers.

### C. THE COURT’S DECISION

Ultimately, the twenty-first century court followed the advice of its predecessor. It said that Mr Anwar’s depiction of the nature of the convictions was “seriously inaccurate”; some other things said had been “misleading”; some other matters were mere expressions of opinion or “no more than comments of a political nature”.<sup>18</sup> However, it could not hold the respondent guilty of “conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself”.<sup>19</sup>

Although avoiding court sanctions, Mr Anwar did not escape judicial rebuke. Unimpressed or at least undeterred by an academic opinion to the effect that there had been no breach of any clear professional rules,<sup>20</sup> the judges observed that a solicitor practising in the High Court had duties to the court that involved showing the highest professional standards and “regrettably, we do not think that those standards were met in this case”.<sup>21</sup> The Law Society of Scotland was left to reflect on the respondent’s conduct and the desirability of revised guidelines, as it chose.

<sup>12</sup> R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland*, 2<sup>nd</sup> edn (2008) paras 7-47, 7-50.

<sup>13</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

<sup>14</sup> For consideration of European countries, see M K Addo (ed), *Freedom of Expression and the Criticism of Judges* (2000).

<sup>15</sup> *R v Colsey*, *The Times* 9 May 1931.

<sup>16</sup> *Alex Robertson* (1870) 1 Couper 404.

<sup>17</sup> *Milburn, Appellant* 1946 SC 301 at 315-316.

<sup>18</sup> At para 44, applying the definition adopted earlier.

<sup>19</sup> Citing Lord Justice-General Emslie in *HM Advocate v Ains* 1975 SLT 177 at 179.

<sup>20</sup> From Professor Donald Nicolson of the Law School, University of Strathclyde. To contrary effect, see C Deane, “Contempt revisited – a sting in the tail” 2008 SCL 1110.

<sup>21</sup> *Anwar* at para 45.

The Anwar proceeding, with its high profile, may or may not reveal much about legal Scotland in the noughties, but regrettably it does not tell us much about the law of contempt.

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## *McInnes v HM Advocate*: Time For A(nother) Definitive Decision on Disclosure

The significant changes to the practice of disclosure wrought by the Judicial Committee of the Privy Council in *Holland v HM Advocate*<sup>1</sup> and *Sinclair v HM Advocate*<sup>2</sup> perhaps gave the impression that the principles decided in those cases were impervious to change. Such were the immediate practical implications of the decisions (routine disclosure in all cases of the police statements and previous convictions of witnesses to be led by the Crown) that initially there was little analysis by the High Court of the approaches that had been taken by the Judicial Committee in disposing of the appeals. This was due in part to the fact that the decisions did not alter the principles governing the Crown's obligation of disclosure<sup>3</sup> so much as the way in which those principles were to be given practical effect. It is also fair to say that, in the period immediately following *Holland* and *Sinclair*, disclosure (or rather the lack of it) was the order of the day in many appeals and was a ground that was generally well received by the court.<sup>4</sup> It was only a matter of time before the tide began to turn again.

In more recent cases the finer points of both decisions have come under greater scrutiny, with the result that one particular principle applied in *Holland* (that concerning the test for assessing the significance of newly disclosed evidence – referred to here as “the *Holland* test”) has in some cases not been applied by the High Court. This note deals with the most recent decision in this area, *McInnes v HM Advocate*,<sup>5</sup> in which the court, in preference to the *Holland* test, proceeded to apply one of its own making.

1 [2005] UKPC D1, 2005 SC (PC) 3.

2 [2005] UKPC D2, 2005 SC (PC) 28.

3 As laid down in *McLeod v HM Advocate* (No 2) 1998 JC 67.

4 See e.g. *Gair v HM Advocate* [2006] HCJAC 52, 2006 SCCR 419; *Johnston v HM Advocate* [2006] HCJAC 30, 2006 SCCR 236; *Gilmour v HM Advocate* [2007] HCJAC 48, 2007 SLT 893.

5 [2008] HCJAC 53.

### A. THE *HOLLAND* TEST

*Holland* concerned, among other things, the Crown's failure to disclose details of outstanding criminal charges faced by a crucial Crown witness. In assessing the significance of that evidence to the appellant's defence, Lord Rodger said the following:<sup>6</sup>

Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness . . . At least that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross examination would have been. But applying the test suggested by Lord Justice General Clyde in *Hogg v Clark* . . . I cannot say that the fact that counsel was unable to cross-examine in this way might not possibly have affected the jury's (majority) verdict.

### B. THE APPROACH IN *McINNES*

In *McInnes* the appellant sought to establish that the non-disclosure of various police statements given by a crucial Crown witness had denied him a fair trial. Relying on the passage in *Holland* quoted above, he argued that the question for the court was not whether disclosure of the statements *would* have made a difference to the outcome of the trial, but whether it *could* have done so.

In rejecting the appeal, the court observed that where the Crown has not disclosed to the defence the police statements of those witnesses it intends to lead, it is necessary to assess whether that failure resulted in the trial as a whole being unfair. The critical issue, the court held, is whether the principle of equality of arms has been breached. This would occur where the statement in question would have been of material assistance to the defence so that denial of access resulted in prejudice, or where "having regard to the realities of the trial and viewing the matter realistically, the denial of access might have prejudiced the defence".<sup>7</sup>

In the court's view, such an assessment would not always be easy but it was not entitled to avoid its task by adopting a test that depended simply on whether the material withheld by the Crown "might not possibly" have affected the outcome of the trial.<sup>8</sup> That was the test applied by Lord Rodger in *Holland*, but it was not clear whether the Judicial Committee in that case had heard argument about the appropriate test to be applied. The *Holland* test was not, the court noted, repeated by Lord Rodger in his opinion in *Sinclair*.

The court added that the *Holland* test had been "used (or abused)" to suggest that the threshold for setting aside jury verdicts in non-disclosure cases was low. Such an interpretation, it was said, may represent a misreading of Lord Rodger's words. In determining whether a miscarriage of justice (or unfair trial) had occurred a robust test was required. In the court's view the correct test was whether non-disclosure of the material in question gave rise to a "real risk of prejudice to the defence".<sup>9</sup>

6 Para 82, referring to *Hogg v Clark* 1959 JC 7.

7 *McInnes* at para 20.

8 Para 20.

9 Para 20.

### C. DISCUSSION

*McInnes* is only the latest High Court decision in which noticeable efforts have been made to avoid the application of the *Holland* test. In *Kelly v HM Advocate*,<sup>10</sup> the court held that in determining whether the act of the Lord Advocate in seeking a conviction without having disclosed a witness statement was compatible with an appellant's article 6(1) Convention right, the critical issues included the materiality of the statement and the nature and extent of any prejudice suffered by the appellant. The *Holland* test, though cited in argument, was not applied, nor was there any justification given for the court's departure from it. In *Fraser v HM Advocate*<sup>11</sup> the Lord Justice Clerk held that in the absence of a devolution issue the non-disclosure ground in that case fell to be determined under section 106 of the Criminal Procedure (Scotland) Act 1995, applying the principles laid down in *Cameron v HM Advocate*<sup>12</sup> for assessing fresh evidence; the implication being that if a devolution issue had been raised the court would require to have applied, or at least considered, the *Holland* test. One might have thought in these circumstances that the fact that a devolution minute was lodged in *McInnes* would have led the court to apply the *Holland* test, but once again it balked at the prospect.

The difficulty for the High Court, of course, is that the Judicial Committee is the last word on devolution issues and hence the question of whether acts of the Lord Advocate are incompatible with Convention rights.<sup>13</sup> This is perhaps why, in *McInnes*, the court, in opting not to apply the *Holland* test, sought to equate its approach with that taken in *Sinclair*. But are the approaches taken in *Holland* and *Sinclair* materially different? It is true that the *Holland* test was not expressly repeated by either Lord Rodger or Lord Hope in *Sinclair*.<sup>14</sup> It is also true that in his assessment of the newly disclosed evidence in *Sinclair* Lord Hope made specific reference to the appellant's defence having been prejudiced by the Crown's failure. However, Lord Hope also stated in *Sinclair* that "[i]t is impossible therefore to say that the appellant's defence was not prejudiced by what happened in this case",<sup>15</sup> an approach not at all dissimilar to the *Holland* test. Furthermore, in *Holland*, Lord Hope expressed full agreement with the opinion of Lord Rodger, including, one must assume, the test applied by the latter in assessing the evidence in that case.

Which of the tests applied in *Holland* and *McInnes* ought to be adopted? Clearly, any assessment of evidence not heard at trial, whether newly disclosed or just "new", must be based on materiality, the only question being the degree of materiality that must be demonstrated before a conviction can justifiably be quashed. The view the High Court has taken of the *Holland* test is plainly based on the concern that it represents too low a hurdle. The fear is that an appellant who has to demonstrate merely that newly disclosed evidence, had it been led, might possibly have affected the jury's verdict will frequently be successful, not because the evidence itself is

10 [2005] HCJAC 126, 2006 SCCR 9.

11 [2008] HCJAC 26, 2008 SCCR 407.

12 1991 JC 251.

13 See Scotland Act 1998 s 103(1).

14 *Hogg v Clark* 1959 JC 7 is not mentioned in any of the opinions in *Sinclair*.

15 *Sinclair* at para 35 per Lord Hope of Craighead.

particularly significant, but simply because, in the general scheme of things, just about anything is possible. At first impression at least the *Holland* test does seem to represent a low standard. On one view, however, the test simply recognises the fact that one can never truly know the impact new evidence would have had on a jury's verdict. All one can do in the circumstances is make an informed judgment as to what the outcome might have been if the evidence had been led.

In some cases it may be found that, while the new evidence is *prima facie* material, its effect upon the jury's verdict is likely to have been minimal, for example because of the weight of other evidence against the appellant. In such a case, given that one can really only speculate as to the nature of the jury's deliberations, there might very well remain a "possibility" that the jury's verdict would have been different; but hypothetical or speculative possibilities in this context ought not to warrant the overturning of a conviction.<sup>16</sup> It is true that in *Hogg v Clark*<sup>17</sup> Lord Justice General Clyde appears not to have considered quite *how* the verdict in that case might have been affected had the evidence in question been admitted; but the same is not quite true of *Holland*. Although it has been suggested that Lord Rodger's approach in that case represents a refusal to "indulge in speculation as to how the failure [to disclose] might have impacted on the jury",<sup>18</sup> the reasons as to why he believed the verdict might have been affected are clearly (albeit briefly) stated in the opinion.<sup>19</sup>

If the *Holland* test is that even a hypothetical or speculative possibility that the jury's verdict would have been different is sufficient to overturn a conviction, then it plainly represents an unjustifiably low standard. If, however (as seems more likely) the test requires a real or reasonable possibility that the verdict would have been different, then it is qualitatively no different from that applied in *McInnes*. A finding that evidence withheld by the Crown might reasonably have resulted in a different verdict, had it been led, is also a finding that the defence has been prejudiced. One finding follows the other. On this interpretation, then, the outcome is likely to be the same whichever test is applied.

It is difficult to justify the approach which has been adopted in several High Court cases in which newly disclosed evidence has been treated differently from "new" or "fresh" evidence presented under section 106(3)(a) of the Criminal Procedure (Scotland) Act 1995. That section permits an appellant to bring an appeal based upon evidence that was not heard at the original proceedings. Newly disclosed evidence plainly falls into that category but in many cases evidence of that kind has been presented to the court without any reference to the relevant statutory provisions.<sup>20</sup> This duality of approach has developed partly in light of *Holland* and *Sinclair* and the resulting debate over whether, and to what extent, principles relating to the fairness of proceedings under article 6 are applicable to the determination of whether

16 See Sir Gerald Gordon's commentary to the SCCR report of *Fraser* for further discussion of this point.

17 1959 JC 7.

18 *Kelly v HM Advocate* [2005] HCJAC 126, 2006 SCCR 9 at para 30.

19 Paras 82 and 83.

20 See *Kidd v HM Advocate* 2000 JC 509; *McPhee v HM Advocate* [2005] HCJAC 137; *Kelly v HM Advocate* [2005] HCJAC 126, 2006 SCCR 9. But see *Fraser v HM Advocate* [2008] HCJAC 26, 2008 SCCR 407; *Gilmour v HM Advocate* [2007] HCJAC 48, 2007 SLT 893.

a miscarriage of justice has occurred.<sup>21</sup> Whatever the relationship between those concepts, it would seem more in keeping with the purpose of the legislation if all evidence “not heard at the original proceedings” proceeded under section 106(3)(a). In non-disclosure cases, the reasonable explanation required under section 106(3A) as to why the evidence was not heard at the original proceedings would in most, if not all, cases be simply that the Crown failed to disclose it in time.

Similarly, it is difficult to justify the application of different tests for assessing new evidence depending upon whether it originates from the Crown or from some other source. Although in *Gilmour v HM Advocate*<sup>22</sup> the court, faced with evidence disclosed post conviction, applied the principles in *Cameron*,<sup>23</sup> there is perhaps something to be said for applying to all evidence not heard at trial a more straightforward test along the lines of that applied in *Holland*, namely whether there is a real possibility that the jury, having heard the evidence, would have returned a different verdict.

#### D. CONCLUSION

Recent decisions in this area reveal the concern with which the *Holland* test is viewed by senior judges of the High Court. There is every possibility that the appellant in *McInnes* will seek leave or special leave to appeal to the Judicial Committee and so one can perhaps expect further developments.<sup>24</sup> A degree of synergy will be required between both courts if further confusion and uncertainty are to be avoided.

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EdinLR Vol 13 pp 112-116

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### “Decriminalisation”: A Pernicious Hypocrisy?

In earlier articles, it was suggested (i) that the proportion of criminal proceedings dealt with by “alternatives to prosecution” now exceeds three quarters,<sup>1</sup> and (ii) that

<sup>21</sup> See *McInnes* at paras 17-20; *Fraser* at paras 190-195 and 219-220; *Coubrough v HM Advocate* [2008] HCJAC 13, 2008 SCCR 317 at paras 94-96.

<sup>22</sup> [2007] HCJAC 48, 2007 SLT 893.

<sup>23</sup> 1991 JC 251.

<sup>24</sup> The Judicial Committee’s decision in *McDonald v HM Advocate* 2008 SLT 993 was issued as this note was in press. The case relates more to the scope of the Crown’s obligation of disclosure than the manner in which information disclosed post-conviction is assessed, although see the comments by Lord Hope at para 37.

<sup>1</sup> R M White, “Out of court and out of sight: how often are ‘alternatives to prosecution’ used?” (2008) 12 EdinLR 481.

there has been a remarkable growth in one alternative, the “conditional offer”, which is “punishment without prosecution”,<sup>2</sup> and constitutes a highly institutionalised plea bargain, removing protections from the guilty, transferring enormous but unaccountable power to the Crown Office, and demonstrating a paradigm-shift from Packer’s<sup>3</sup> “due process” to “crime control” values.<sup>4</sup> This note seeks to further the analysis by considering another “alternative to prosecution”, characterisable as “decriminalisation”.

## A. THE LEGISLATION

### (1) Road Traffic Act 1956

The Road Traffic Act 1956 introduced parking meters,<sup>5</sup> with charging in three stages: (i) a “standard period” with an “initial charge”, payable through the meter;<sup>6</sup> (ii) a further period with an additional “excess charge”, payable separately;<sup>7</sup> and (iii) the period thereafter, during which to remain constituted an offence.<sup>8</sup> The first was regarded by the Government as contractual.<sup>9</sup> The third was clearly a criminal offence.<sup>10</sup> What was the second? It was not a criminal offence, as it was not in the “[o]ffences ...” section, drafting was inapt, and in the Parliamentary debates the Minister asserted it was “not a fine”.<sup>11</sup> The Government regarded it as contractual, like the first, for when challenged, the Minister replied that “the excess charge ... is a charge made for the use of the highway and does not in any way involve the commission of an offence”.<sup>12</sup> The device was used instead of an offence because: “[t]o haul a man off to court after two hours [parking overstay] is rather severe treatment, [so] what we suggest instead is an excess charge”.<sup>13</sup>

This is either disingenuous or confused. The “excess charge” was clearly a device to apply a penalty without creating a criminal offence. The penalty masqueraded as a contract price, so was imposed non-judicially, without the protections of criminal procedure, and enforced as a civil debt. Also, the motorist might still be “hailed off to court” for, while it was not an offence to overstay into the second stage, it was an

<sup>2</sup> *Lord Advocate v Aberdeen Corporation* 1977 SLT 234 at 235.

<sup>3</sup> See H L Packer, *The Limits of the Criminal Sanction* (1968) ch 8.

<sup>4</sup> R M White, “The Summary Criminal Proceedings (Abolition) (Scotland) Act 2007? A critical view of Part 3 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007” 2008 JR 215.

<sup>5</sup> Road Traffic Act 1956 ss 19-25. *The Scotsman* 11 June 2008 reported the 50<sup>th</sup> anniversary of the first installation of a parking meter in the UK, in Grosvenor Square, London.

<sup>6</sup> Road Traffic Act 1956 s 20(1), (2), read with s 21(4), (7). See also s 21(5), (6) and the Parking Meters (Description and Testing) (Scotland) Order 1959, SI 1959/1348 (cf the Parking Meters (Description and Testing) (England and Wales) Order 1957, SI 1957/822).

<sup>7</sup> Road Traffic Act 1956 s 20(3).

<sup>8</sup> Road Traffic Act 1956 ss 21(5), 22(1). See also s 22(4).

<sup>9</sup> See e.g. HC Deb 30 May 1956, col 295. *Sed quare* why it was not taxation.

<sup>10</sup> Road Traffic Act 1956 s 22(1)(a), and note s 22(4).

<sup>11</sup> HC Deb 4 July 1956, col 295 (Mr Molson MP).

<sup>12</sup> Col 296.

<sup>13</sup> HL Deb 21 Dec 1954, col 519 (the Earl of Selkirk, regarding an identical provision in the aborted Road Traffic Bill 1954).

offence to fail to pay the “excess charge” for overstaying,<sup>14</sup> and the breach of contract thus became a criminal offence.

## (2) Transport Act 1982

Road traffic “conditional offers” were introduced by the Road Traffic and Roads Improvement Act 1960. One of the aims of the Transport Act 1982 was to improve their enforcement<sup>15</sup> by, among other things, police wheel-clamping.<sup>16</sup> The police were allowed to “fix an immobilisation device” to “a vehicle ... permitted ... to remain at rest [on a road]... in contravention of any prohibition or restriction imposed by or under any enactment”.<sup>17</sup> These words could hardly be wider, but the police might also move the vehicle “to another place on ... another road” to clamp it.<sup>18</sup> Further, there was a charge for release.<sup>19</sup> The Minister reasoned that “the cost and inconvenience involved [in obtaining release] will ... act as a serious deterrent [and] ... leaves the immobilised car on view as an effective warning to other drivers”.<sup>20</sup>

Again, this is either disingenuous or confused. Wheel-clamping was clearly intended as punishment, not confiscation. Further, the release fee looks like further punishment, not payment of a contractual administration fee:<sup>21</sup> so another penalty masquerading as price. In any event, this is another case of penalties imposed non-judicially and without the protections of criminal procedure but, in a new twist, requiring no enforcement, being self-enforcing self-help: for no fee, no car. These provisions were never actually brought into force, but were re-enacted in almost identical form by the Road Traffic Regulation Act 1984.<sup>22</sup>

## (3) Road Traffic Act 1991

The Road Traffic Act 1991<sup>23</sup> provisions in relation to enforcement of parking regulations were held out as “a radical change ... [whereby] ... most non-endorsable illegal [*sic*] parking offences could be decriminalised and enforced by local

<sup>14</sup> Road Traffic Act 1956 s 22(1)(a).

<sup>15</sup> HC Deb 9 Feb 1982, col 870 (though wheel-clamping was only introduced at the Report Stage: HC Deb 25 May 1982, cols 675 ff).

<sup>16</sup> At common law, wheel-clamping was unlawful in Scotland (*Black v Carmichael* 1992 SLT 897), though lawful in England and Wales (*Arthur v Anker* [1997] QB 564): see R M White, “Parking’s fine: the enforceability of ‘private’ parking schemes” 2007 JR 1.

<sup>17</sup> Transport Act 1982 s 53(1)(a), read with s 53(9).

<sup>18</sup> Transport Act 1982 s 53(1)(b).

<sup>19</sup> Transport Act 1982 s 53(4), (10).

<sup>20</sup> HC Deb 24 May 1982, col 675 (Mr Howells MP).

<sup>21</sup> Though Mr Howells did assert that they “are not fines, but administrative charges to cover costs”: HC Deb 24 May 1982, col 678. The fee is £32: Vehicles (Charges for Release from Immobilisation Devices) Regulations 1991, SI 1991/338.

<sup>22</sup> Road Traffic Regulation Act 1984 ss 104-106.

<sup>23</sup> Extended to Scotland only at the Report Stage in the House of Lords: HL Deb 10 June 1991, cols 978-981 and 24 June 1991, col 454.



authorities”.<sup>24</sup> In “permitted” and “special” parking areas,<sup>25</sup> street parking offences<sup>26</sup> might “cease to apply”.<sup>27</sup> They were replaced by “penalty charges”,<sup>28</sup> administered for local authorities by “parking attendants”<sup>29</sup> operating a “penalty charge notice” system,<sup>30</sup> with two methods of enforcement. The vehicle might be wheel-clamped,<sup>31</sup> with a release fee,<sup>32</sup> and unpaid “penalty charges” might be overtaken by “charge certificates”, which increased the charge by 50%<sup>33</sup> and were treated as enforceable sheriff court judgment debts.<sup>34</sup>

Here there is again either disingenuousness or confusion. A parallel, “decriminalised”, parking control scheme is set up, mimicking the existing one. It builds on the devices of penalty masquerading as debt, and self-enforcing self-help, thus removing the protections of criminal procedure, but goes further. It purports to remove the criminal law entirely.

## B. CONCLUSION

As “conditional offers” have grown,<sup>35</sup> so has “decriminalisation”.<sup>36</sup> On the face of it, “decriminalisation” is straightforward. What was criminal is no longer so: thus it is legal.<sup>37</sup> However, though only the last-mentioned was explicitly described as “decriminalisation”, the devices created by the Road Traffic Act 1956, Transport Act 1982 and Road Traffic Act 1991 are all of a piece, and they do not make legal what was criminal. Rather they constitute another form of “punishment without prosecution”.

This “decriminalisation” can be defined as the imposition of a penalty without resort to criminal proceedings. There is no offence, thus no possibility of prosecution

24 HL Deb 18 Mar 1991, cols 404-405 (Lord Brabazon of Tara).

25 The legislation was drafted principally in relation to London (Road Traffic Act 1991 ss 50-82, as amended), but extendable to other parts of the UK with possible modification (Road Traffic Act 1991 s 43 and Sch 3 paras 1(1)(d), 2(1)(c), as amended). It was extended with modification to Aberdeen, Dundee, Edinburgh, Glasgow, and parts of Perth and Kinross and South Lanarkshire by SSIs 2003/70, 2004/87, SI 1998/1539, SSIs 1999/59, 2002/398 and 2005/11 respectively (all as amended). These “Scottish Designation Orders” (“SDOs”) are essentially identical, art 3 applying the relevant provisions, arts 2 (with Sch 2) and 5 (with Sch 3) modifying them.

26 For “permitted” areas, see Road Traffic Regulation Act 1984 ss 35A, 47, 53 (see Road Traffic Act 1991 Sch 3 para 1(4)), as applied with modifications. For “special” areas see Road Traffic Regulation Act 1984 ss 5, 11, 16, 16A, 16C, 61; Roads (Scotland) Act 1984 ss 62, 129; Road Traffic Act 1988 ss 19, 21 (see Road Traffic Act 1991 Sch 3 para 2(4)), as applied with modifications.

27 Road Traffic Act 1991 Sch 3 paras 1(4) and 2(4) (as amended), as applied with modifications.

28 Road Traffic Act 1991 s 82(1) as applied with modifications by SDOs (n 25) Sch 2 para 6(1).

29 Road Traffic Regulation Act 1984 s 63A (inserted by Road Traffic Regulation Act 1991 s 44), as applied with modifications by SDOs (n 25) Sch 3 para 3: see s 82(1) as applied with modifications by SDOs (n 25) Sch 2 para 6(1).

30 Road Traffic Act 1991 s 66(1), (3) as applied with modifications by SDOs (n 25) Sch 2 para 1.

31 Road Traffic Act 1991 s 69(1), as applied with modifications by SDOs (n 25) Sch 2 para 2.

32 Road Traffic Act 1991 s 69(4), as applied without modification by SDOs (n 25) art 4.

33 Road Traffic Act 1991 Sch 6 para 6, as applied with modifications by SDOs (n 25) Sch 2 para 7.

34 Road Traffic Act 1991 Sch 6 para 7, as applied with modifications by SDOs (n 25) Sch 2 para 7.

35 See White (n 4).

36 There is “decriminalisation” in other areas, too.

37 Cf *The Motorist and Fixed Penalties: First Report by the Committee on Alternatives to Prosecution* Cmnd 8027: 1980) para 4.01.

(and no possible “conditional offer”), but there is a penalty nevertheless, and one exacted by civil proceedings, or self-help, rather than by the criminal law. Thus, “decriminalisation” is misleading, being used to describe imposition of a penalty, and its exaction after removal of all safeguards of criminal procedure. This is like re-labelling questioning a suspect as “not-questioning”, and treating all evidence thus obtained as admissible, because the caution is only necessary when there is questioning.

Nor is this a flight of fancy, for the European Court of Human Rights supports the analysis. It decided that whether a person was “charged with a criminal offence”, and thus entitled to the protection of article 6(2) and (3) of the ECHR, depended upon three criteria: how the national system classified the act; the nature of the offence; and the severity of the punishment.<sup>38</sup> These criteria were discussed and applied in a case directly concerned with a “decriminalised” regulatory offence in German road traffic law.<sup>39</sup> On the three criteria, the Court found, firstly, that there was no important difference between the decriminalised offence and a standard criminal offence; secondly, that the decriminalised offence applied deterrent penalties and was regarded as criminal in many states, retaining a punitive character, and, further, that article 6 applied to minor offences as well as to major, and states should not be allowed to exempt themselves from it by re-labelling; and thirdly, in the light of the foregoing, that it was not necessary to consider severity.<sup>40</sup>

In Packer’s terms, “crime control” appears triumphant, and “due process” almost to have vanished, in respect of “decriminalised” offences. Further, if all decriminalised parking (and any other) offences are included, the proportion of criminal proceedings dealt with by “alternatives to prosecution” must be much greater than three quarters.

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## No Sex Please, We’re European: *Mosley v News Group Newspapers Ltd*

### A. THE “RATHER UNUSUAL” FACTS

The “rather unusual” circumstances of *Mosley v News Group Newspapers Ltd*<sup>1</sup> are widely known. Mosley is President of the Fédération Internationale de l’Automobile.

<sup>38</sup> *Engel and Others v Netherlands* (1979-80) 1 EHRR 647 at paras 80-83.

<sup>39</sup> *Öztürk v Germany* (1984) 6 EHRR 409.

<sup>40</sup> *Öztürk* at paras 22-53.

<sup>1</sup> [2008] EWHC 1777 at para 234 per Eady J.

He is also the son of the late Sir Oswald Mosley, founder of the British Union of Fascists and friend of Hitler. For some time Mosley had been having regular rendezvous with a group of five women referred to in the report as “dominatrices”. Group sex took place accompanied by sado-masochistic role-play. Money changed hands, but the participants were on sufficiently cordial terms to be arranging a birthday party for Mosley at no extra charge. On the occasion in question one of the women, “Woman E”, had been paid by the *News of the World* to conceal a camera in her clothing, with which she filmed proceedings. The resulting pictures showed the group acting out a prison camp scenario—a routine familiar on the “S and M” scene—in which the women alternated between military-type and prisoners’ uniforms. Mosley’s head was checked for lice and his bottom was shaved. There was a great deal of spanking, involving several participants, but no significant injury was inflicted beyond a wound to Mosley’s buttock, to which an elastoplast was applied. The role-play involved some dialogue in German in order to reinforce the sense of domination and enhance its thrill.<sup>2</sup> The images were published not only in the print version of the newspaper but also on the internet. Between 30 and 31 March 2008 the on-line article was visited approximately 435,000 times, and the discreetly-edited footage received 1,424,959 hits.<sup>3</sup>

Having failed to obtain an injunction against publication, Mosley sued the publishers for breach of confidence and breach of his right to protection for his private life, as provided by article 8 of the European Convention on Human Rights. The publishers in turn invoked article 10, protecting freedom of expression, claiming that the role-play had Nazi overtones which “parodied the Holocaust horrors”.<sup>4</sup> Such conduct ill became the president of an international sporting organisation, who dealt with sportspersons of all races and religions, and it was in the public interest that it should be exposed. However, this interpretation of events was not substantiated, the defence was rejected, and damages of £60,000 were awarded.<sup>5</sup>

The outraged British “red-top” press immediately denounced “another step towards the creation here of a dangerous European-style privacy law”.<sup>6</sup> However, Mr Justice Eady maintained, with some justification, that there was nothing “landmark” in his decision<sup>7</sup>—at least on the law.

## B. BALANCING ARTICLES 8 AND 10: THE “NEW METHODOLOGY”

The most important development in the English law of confidentiality in recent years has been its abandonment of the limiting constraint of the need for an initial confidential relationship. A “duty of confidence” may now be imposed on a person unknown to the claimant if that person has come by “information he knows or

2 Italian and French would not have produced this effect; Russian would have been more suitable, but no one spoke it: para 59.

3 Para 7.

4 Para 122.

5 For reasons of space this note omits discussion of Mosley’s unsuccessful attempt to claim additional “exemplary” damages, an aspect of the case that can safely be left to English commentators.

6 *The Sun* 25 July 2008.

7 Para 234.

ought to know is fairly and reasonably to be regarded as confidential”.<sup>8</sup> Whereas the “old-fashioned”<sup>9</sup> equitable wrong of breach of confidence imposed obligations of conscience arising from prior interaction,<sup>10</sup> a new tort of misuse of private information recognises liability between complete strangers.<sup>11</sup> The *Mosley* judgment, however, does nothing to push forward the limits of confidentiality in this way.<sup>12</sup> Although the technology used by woman E may have been state-of-the art,<sup>13</sup> this was otherwise an “old-fashioned” breach of confidence arising out of an existing relationship in which she, Mosley, and all the other participants acknowledged the “recognised code of discretion on ‘the [S and M] scene’”.<sup>14</sup> But this was not the only feature of the case which was only nearly new.

On closer inspection the novelty of the “new methodology”<sup>15</sup> applied in the case is perhaps exaggerated. This methodology, for balancing article 8 and article 10 rights, draws upon the principles which have emerged in case law since the enactment of the Human Rights Act 1998.<sup>16</sup> Freedom of expression is now to be independently recognised, rather than considered merely as one of the strands of public interest considerations, but it does not “trump”<sup>17</sup> privacy, or vice versa. Instead the competing requirements of articles 8 and 10 are to be weighed up by applying an “intense focus” to the circumstances and the justifications offered by both sides. This means that cases can no longer be determined, as sometimes in the past, by reference to generalisations such as “the interest of the public in knowing the truth outweighs the interest of a plaintiff in maintaining his reputation”,<sup>18</sup> or (the example caricatured by Eady J), “public figures must expect to have less privacy”.<sup>19</sup>

In truth, however, the law of confidentiality has always attempted some form of balancing exercise where the confidant has invoked the public interest in disclosure. The method applied in *Mosley*’s “ultimate balancing exercise”<sup>20</sup> is thus in itself hardly new; it is “essentially the same exercise, although it is plainly now more carefully focussed and more penetrating”.<sup>21</sup> On the other hand, the character and weighting attributed to the balancing factors have altered very considerably. Whereas English

8 *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457 at para 14 per Lord Nicholls.

9 *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at para 8 per Buxton LJ.

10 *Campbell* at para 44 per Lord Hoffmann.

11 *Campbell* at para 14 per Lord Nicholls.

12 See *Mosley* at paras 182-184.

13 And Eady J noted (paras 16-23) that disclosure of visual images is potentially even more intrusive than the written word; see also *Theakston v MGN Ltd* [2002] EWHC 137, [2002] EMLR 22.

14 Para 105.

15 Paras 7 ff.

16 Notably *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457 and *Re S* [2004] UKHL 47, [2005] 1 AC 593, in particular a *dictum* by Lord Steyn at para 17. See also *X v BBC* 2005 SLT 796; *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73; *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57; *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 103.

17 Para 10.

18 *Woodward v Hutchins* [1977] 1 WLR 760 at 763 per Lord Denning MR.

19 *Mosley* at para 12.

20 *Mosley* at para 12 (the terminology is Lord Steyn’s: see *Re S* at para 23).

21 *Campbell* at para 86 per Lord Hope.

law has traditionally been regarded as a remedies-based system,<sup>22</sup> incorporation of the ECHR into domestic law has entailed acceptance of a “new rights-based jurisprudence”.<sup>23</sup> The rights set out in articles 8 and 10 ECHR have ceased to be “merely of persuasive or parallel effect” and have now entered into “the very content” of the Common Law.<sup>24</sup> They have become the prism through which the required “intense focus” is adjusted.

It has long been accepted in the Common Law that sexual and other intimate relationships should normally be kept secret,<sup>25</sup> and in that sense article 8 and Strasbourg jurisprudence reinforce existing protection for this “most intimate aspect of private life”.<sup>26</sup> But the concern for the individual’s right to autonomy and dignity has brought a new emphasis.<sup>27</sup> The concept of informational autonomy<sup>28</sup> means that there are certain “zones of interaction”<sup>29</sup> between public and private life which individuals must be permitted to protect from disclosure. Even well-known figures now have a reasonable expectation of confidentiality for private recreational time,<sup>30</sup> however they choose to spend it, if this has no bearing upon their public functions.<sup>31</sup> The nineteenth-century adage that “there is no confidence in iniquity”<sup>32</sup> does not apply simply because some might regard the claimant’s conduct as “fetishistic”, “distasteful” or even “perverted”. As long as the participants are genuinely consenting and there is no significant breach of the criminal law, “the private conduct of adults is essentially no-one else’s business”.<sup>33</sup>

This expansive, rights-based view of private life is accompanied by a more specific approach to matters of public interest. The distinction between what is “interesting to the public” and what is “genuinely a matter of public interest” is now clearly acknowledged,<sup>34</sup> and although the balance between article 8 and article 10 will always involve “moral relativism”,<sup>35</sup> the scope for “judicial idiosyncrasy”<sup>36</sup> is narrowed. The

22 See e.g. *Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120 at 1129 per Browne-Wilkinson VC.

23 Paras 128, 130.

24 *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at para 11 per Buxton LJ, citing Lord Woolf CJ in *A v B plc* [2002] EWCA Civ 337, [2003] QB 195 at para 4.

25 See e.g. *Stephens v Avery* [1988] Ch 449.

26 *Dudgeon v UK* (1982) 4 EHRR 149 at para 52.

27 *Mosley* at para 214; see also *Campbell* at para 50 per Lord Hoffmann.

28 *Campbell* at para 134 per Baroness Hale.

29 Applied in *PG v UK* (2008) 46 EHRR 51 at para 56 (decided 2001); *Peck v UK* [2003] EMLR 15; *von Hannover v Germany* (2005) 40 EHRR 1. UK cases include *Adams v Scottish Ministers* 2004 SC 665; *X v BBC* 2005 SLT 796.

30 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2008] EMLR 12 at para 55 per Sir Anthony Clarke MR.

31 *von Hannover* at para 76.

32 *Gartside v Outram* (1856) 26 LJ Ch 113 at 114 per Wood VC.

33 *Mosley* at paras 106 and 128.

34 Para 114; also *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch), [2003] EMLR 31 at para 231 per Lindsay J.

35 Para 130.

36 *Smith Kline & French Laboratories (Australia) v Secretary Department of Community Services and Health* [1990] FSR 617 at 663 per Gummow J; see also R G Toulson and C M Phipps, *Confidentiality*, 2<sup>nd</sup> edn (2006) para 6-017.

priorities for freedom of expression are drawn by ranking different types of speech.<sup>37</sup> Top of the list come questions of national security or political, social or artistic debate, followed by impropriety or mismanagement in the commercial sector,<sup>38</sup> crime or wrongdoing. However, the right freely to express oneself with regard to the personal lives of others is much more contested. Disclosure in these matters engages article 10 rights only when this has broader implications for the public concerns mentioned above, as for example when undue influence or corruption would be uncovered thereby.<sup>39</sup>

### C. “RESPONSIBLE JOURNALISM”

Application of the “new methodology” was unproblematic in *Mosley*. Mockery of the Holocaust by a high-ranking official in the sporting world would certainly have engaged legitimate public interest, even where the claimant’s private life was violated by such disclosures,<sup>40</sup> but in the absence of evidence of any such Nazi connotations there was no reason to deny Mosley his remedy. However, a further question pondered by Eady J was whether consideration should be given to the concept of “responsible journalism”.<sup>41</sup> Courts rule on public interest with the benefit of hindsight, but should they also step into the shoes of the journalist prior to publication to assess whether the proper checks were carried out or whether the decision to publish was “made in a casual, cavalier, slipshod or careless manner”?<sup>42</sup> The question was academic in this case since the decision to run the story was quite clearly “precipitate” and lacking in “rational analysis”.<sup>43</sup> However, Eady J’s judgment leaves open for a future court the question whether an analogy might yet be drawn in this regard between the law of confidentiality and the law of defamation<sup>44</sup> by making some allowance for responsible reporting of sensitive privacy issues.

### D. THE IMPLICATIONS OF MOSLEY FOR SCOTS LAW

The Scots case law on confidentiality is sparse and dominated by disputes involving trade secrets. Either the Scots have few secrets or they are good at keeping them, and when their personal confidences are betrayed these are typically published in the English media so that any litigation goes to London.<sup>45</sup> It is no doubt this lack of native authority which has made the delict of breach of confidence unusually porous to

37 *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457 at para 148 per Baroness Hale.

38 See e.g. *Response Handling Ltd v BBC* [2007] CSOH 102, 2008 SLT 51.

39 *Mosley* at paras 20 and 46.

40 Para 122.

41 Para 141.

42 Para 136, citing *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 at para 27 per Lord Bingham.

43 Para 170.

44 Although they were “two very different torts”: para 141.

45 See e.g. *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [2008] EMLR 12.

English influence,<sup>46</sup> notwithstanding the equitable foundation of confidentiality south of the border. But in any event there is no reason why *Mosley's* “new methodology” should not be assimilated insofar as it deals with the scope of Convention rights.<sup>47</sup> In both jurisdictions it is now uncontroversial that “people’s sex lives are to be regarded as essentially their own business—provided at least that the participants are genuinely consenting adults and there is no question of exploiting the young or vulnerable”.<sup>48</sup>

The more far-reaching question, yet to be answered, is how the structures of Scots common law will sustain this new rights-based jurisprudence. English law has ensured extensive protection for informational privacy by expanding the range of breach of confidence into the law of tort, and there is no reason in principle why Scots law should not adopt a similar approach with the delict of breach of confidence. But informational privacy is only one aspect of the right to private life protected by article 8. What of the rights to the equally deserving territorial<sup>49</sup> and personal/corporeal<sup>50</sup> zones of privacy? In the absence of a general tort of breach of privacy such rights have incomplete protection in English law. The shift to a rights-based jurisprudence should present fewer conceptual challenges to the Scots, for whom the law of delict, in principle at least, has always been based upon rights rather than remedies.<sup>51</sup> It remains to be seen, however, whether courts in Scotland will draw upon this inherent flexibility to provide for the right to private life in a manner which is more rational and comprehensive.

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## Contract Formation in the Electronic Age

It is all too easy to imagine, in an era when electronic communications are becoming the norm and commercial contracts are increasingly concluded by e-mail, that the

<sup>46</sup> See e.g. *Morton & Co v Muir Brothers & Co* 1907 SC 1211 at para 1224 per Lord McLaren: “the law of England is to the same effect as our own. Indeed the laws could not well be different”. Also *Lord Advocate v Scotsman Publications Ltd* 1989 SC (HL) 122 at 164 per Lord Keith: “the substance of the law in [Scotland and England] is the same”.

<sup>47</sup> A similar analysis is applied in *X v BBC* 2005 SLT 796 by Temporary Judge Thomson (paras 48-49).

<sup>48</sup> *Mosley* at para 100.

<sup>49</sup> See e.g. *Martin v McGuinness* 2003 SLT 1424 (over-intrusive surveillance of the home).

<sup>50</sup> See e.g. *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406; *Wainwright v UK* (2007) 44 EHRR 40 (inappropriate strip-search).

<sup>51</sup> See e.g. Lord Dunedin, “The divergencies and convergencies of English and Scottish law” (Fifth lecture on the David Murray Foundation in the University of Glasgow, 21 May 1935); J Guthrie Smith, *The Law of Damages: A Treatise on the Reparation of Injuries*, 2<sup>nd</sup> edn (1889) 40.

traditional rules on when postal contractual communications take effect are of little, if any, practical relevance. Indeed, a search through decisions of the Scottish courts over the last twenty years will disclose few reported cases where the traditional rules have required judicial consideration. The recent decision of the Outer House in *Carmarthen Developments Ltd v Pennington*<sup>1</sup> serves as a reminder, however, that some types of contract, particularly those concerning land, continue largely to be concluded by way of paper transaction, that notices served under them are also usually transmitted in the same manner, and that therefore the traditional rules on when such communications take effect are still important in determining the exercise of the parties' rights.

### A. THE FACTS

The essential facts in *Carmarthen* were that the pursuer had entered into contracts for the purchase of two plots of land owned by the defender. Each contract, concluded by way of paper offer and unqualified acceptance, contained a clause making the purchase subject to fulfilment of three suspensive conditions, but also giving the pursuer the option to waive these conditions by serving written notice to that effect upon the defender. Service of such notice would deprive the defender of the right which he would otherwise have to resile from the contract should the suspensive conditions not be purified within two years. The pursuer delayed in purifying the suspensive conditions, and was therefore able to postpone paying the purchase price to the defender. The defender resolved to resile from the contracts as soon as he was able, the first moment at which he might do so being 9 am on Monday 22 October 2007. The defender's solicitor faxed a notice of withdrawal from the contracts on Saturday 20 October, in good time for this fax to take effect at 9 am the following Monday morning. In the meantime, however, the pursuer's solicitor had posted a notification to the defender's solicitor intimating that the pursuer was exercising its right to waive compliance with the suspensive conditions. This notification was uplifted by the Royal Mail on Friday 19 October. There was no conclusive evidence as to whether the notification had reached the defender's solicitor on Saturday 20 October or Monday 22 October, but it had to have been on one of those two days. On Monday 22 October, the defender's solicitor collected the mail sack containing his firm's business post from the Post Office at about 8.50 am, taking it to his office at around 9.03 am. None of the mail in that sack was opened until later that day.

### B. THE QUESTION

The question which the court had to answer was whose communication had taken effect first, the pursuer's waiver of the suspensive conditions or the defender's withdrawal from the contracts? It was clear that, under the terms of the contracts, the pursuer could not successfully resile until the fax intimating withdrawal took effect at 9 am on the Monday morning. What was not clear was whether, by that

1 [2008] CSOH 139.



time, the pursuer had already successfully exercised its option to waive the suspensive conditions and thus hold the parties to the contracts. What had to be determined was the point at which the letter exercising the option to waive the suspensive conditions took effect. Was it when it was posted, by virtue of the application of the postal rule, or was it when it was delivered to the defender's solicitor? If the latter, did the moment of delivery occur when the mail bag was collected by the defender's solicitor at the Royal Mail sorting office, when the bag was deposited at the solicitor's office, or not until the letter was opened later in the day? The contracts did not make this clear, and so it fell to the court to decide, by inferring the intention of the parties from the whole terms of the contract and by application of the common law rules on contractual communications.

The postal acceptance rule entails that, if parties envisage communication *inter se* by post as a permitted method of forming a contract, and do not exclude the postal acceptance rule, the rule will be deemed to apply to their communications so that any unqualified acceptance of the contract will take effect when posted. The pursuer's first line of argument was therefore that the exercise of its option to waive the suspensive conditions was governed by the postal rule. The problem was that such notice of waiver was not an acceptance of a contractual offer; rather, it appeared to be the exercise of a unilateral right conferred under an already concluded contract. Does the postal acceptance rule extend to such a notice? Lord Hodge thought not. Having explained the authorities establishing the postal rule in Scots law, he remarked "[c]ounsel were not able to point to any authority in Scots law in which the postal acceptance rule had been applied to communications other than the acceptance of a contractual offer".<sup>2</sup> Lord Hodge noted that, in English law, *Bruner v Moore*<sup>3</sup> was to the effect that an option exercised by telegraph was covered by the postal rule and was thus exercised at the moment the telegram was sent. However, the option in that case appears to have been treated as taking the form of an offer, open for acceptance for a specified period because given for valuable consideration, and thus exercisable by way of an acceptance. As Lord Hodge noted, although an option in Scots law may take one of a number of forms (his Lordship mentions the forms of a unilateral promise, a conditional contract, a *sui generis* right, or even sometimes an offer), most of these forms entail that "the exercise of the option is the exercise of the right conferred by the contract or promise and not the acceptance of an offer".<sup>4</sup> The obvious exception to that would naturally be those cases where an option was indeed in offer form. However, without Lord Hodge specifying precisely which form the option took in this case – a unilateral promise contained within each contract seems the most likely characterisation – it is clear, by virtue of the fact that Lord Hodge did *not* consider the postal rule applicable to the facts, that the exercise of the options in question was not treated as amounting to an acceptance of an option having offer form.

In addition to these observations on the characterisation of the exercise of options in prior cases, Lord Hodge also felt that the terms of the contract as a whole

<sup>2</sup> Para 13.

<sup>3</sup> [1904] 1 Ch 305.

<sup>4</sup> *Carmarthen Developments* at para 15.

favoured the position that the waiver would not take effect until receipt by the defender. Principally, Lord Hodge referred to the notice clause in each contract, which was expressed in terms of intimation, a term more consistent with receipt than transmission. Thus, the terms of the contract, the usual characterisation of options, and the common law scope of the postal rule, all pointed to the exclusion of the postal rule in this case.

The pursuer's second argument was that the notice of waiver must have been delivered to the defender's agent in the Saturday, rather than Monday, postbag. This argument gave rise to a portion of Lord Hodge's judgment titled "What was in the Saturday morning mailbag?" containing, *inter alia*, discussion of the statistics relating to delivery times of first class post in Jedburgh (the defender's agent's place of business). The statistical evidence on its own was slightly in favour (62.7%) of a Saturday morning delivery, but, in the event, Lord Hodge preferred the evidence of the defender's solicitor, which was that no letter from the pursuer had arrived in the Saturday morning mailbag. The pursuer's second argument was thus also rejected.

The pursuer's third line of argument, ultimately successful, was that the waiver of the suspensive conditions took effect when delivered to the defender, such delivery occurring when the Monday postbag was uplifted by the defender's solicitor. On the facts of the case the firm's postbag (including the notice of waiver) came into the physical possession of the defender's agent when collected from the Royal Mail at 8.50 am on the Monday morning. Lord Hodge concluded that the waiver took effect at that precise time, ten minutes before the defender's purported withdrawal could take effect. It did not matter that the notice of waiver was not read till later for, as Lord Hodge commented, "[i]t is the task of recipients of mail to arrange for its prompt handling and the sender of a notice cannot be prejudiced by internal delays in so doing".<sup>5</sup> His Lordship cited in support of this view the decision in *Brinkibon Ltd v Stahag Stahl GmbH*,<sup>6</sup> he might also have added the less well-known Scottish decision of *Burnley v Alford*, where a delay in reading telegrams revoking an offer was held not to prejudice the sender because, according to Lord Ormidale, the telegrams "ought to have been read on receipt and, if they had, the cancellation of the sale would have been known" before the recipient attempted to accept the revoked offer.<sup>7</sup> It is of course less usual for mail to be collected from the offices of the Royal Mail, more usual for the postman to effect delivery. Where the latter occurs, it is accepted that transmission of the communication takes effect, in Lord Hodge's words, "by pushing the letter ... through the letter box".<sup>8</sup> Was it thus unfair to the defender that, because his agent collected the mailbag personally, transmission of the waiver took effect earlier than it would have done had normal letter box delivery taken place? Lord Hodge thought not: by collecting the post one puts oneself in the same position (that is, in actual receipt of the mail) as one is in when delivery is effected by the postman through the letter box. As such, the same rule ought to apply: delivery of

<sup>5</sup> Para 31.

<sup>6</sup> [1983] 2 AC 34.

<sup>7</sup> 1919 2 SLT 123 at 127.

<sup>8</sup> *Carmarthen Developments* at para 31.

the contractual communication takes effect upon receipt by the party to whom it is delivered.

### C. CONCLUSION

The facts of this case were clearly dramatic in that the difference in time between each party's communication taking effect was a mere ten minutes, but equally small time differences have had similar dramatic effect (sometimes to a greater pecuniary extent) in other cases. The decision in *Carmarthen* is a reminder that the rules on when contractual communications take effect remain as crucial for paper transactions as for cases of electronic communications. Lord Hodge was doubtless correct to give the postal rule a restrictive application. Not only does that seem right from a policy perspective, given that the postal rule has fallen largely out of favour, but it is also surely right to recognise that the exercise of an option contained within a contract is not the acceptance of a contractual offer, save in those very rare cases where the option itself takes the form of an offer (as in the unusual case of *Hamilton v Lochrane*).<sup>9</sup> It likewise seems correct to reaffirm that the ordinary rule for postal contractual communications is that they take effect upon delivery, and that, in the case of post collected by the intended recipient from the Royal Mail, such delivery is effected at the moment of collection. If the position is intended to be otherwise, clearly drafted terms within the contract to that effect should be included.

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## *Hadley v Baxendale* Revisited: *Transfield Shipping Inc v Mercator Shipping Inc*

*Transfield Shipping Inc v Mercator Shipping Inc*<sup>1</sup> is the first full House of Lords discussion for some forty years of Alderson B's classic exposition in *Hadley v Baxendale*<sup>2</sup> of the measure of contractual damages.<sup>3</sup> Although a unanimous judgment<sup>4</sup> in which several of their Lordships express agreement with each other,

<sup>9</sup> (1899) 1 F 478.

<sup>1</sup> [2008] UKHL 48, [2008] 3 WLR 345.

<sup>2</sup> (1849) 9 Exch 341, 156 ER 145.

<sup>3</sup> The last full discussion took place in *C Czarnikow Ltd v Koufos (The Heron II)* [1969] 1 AC 350: *Transfield* at para 71 per Lord Walker.

<sup>4</sup> Or at least, a decision in which no dissenting judgment was given. It is not entirely clear if Baroness Hale's speech should be treated as a reluctant vote in favour of the granting of the appeal, or as an abstention: see para 93.

the speeches of the House nevertheless advance three distinct bases for the decision. The full impact of the case will therefore only become clear through time.

#### A. FACTS AND BACKGROUND CIRCUMSTANCES

By a series of contractual arrangements, Mercator Shipping Inc, the owners of the bulk carrier *The Achilles*, let her under a time charter to the charterers, Transfield Shipping Inc. The charterers were obliged to redeliver the vessel to the owners no later than 2 May 2004. On 21 April 2004, the owners entered into a fresh charter with new charterers which followed on almost immediately after the period of the Transfield charter: the last date for delivery to the new charterers, after which they were entitled to cancel the charter, was 8 May 2004. The new charter was for a period of 4 to 6 months at a daily rate of \$39,500. In the meantime, the charterers had entered into a sub-charter of the vessel, committing it to take a load of coals from China for discharge in two Japanese ports. It was anticipated by the parties that this voyage would be completed in time to permit timeous redelivery. In the event, however, the vessel was delayed in port and was not redelivered to the owners until 11 May. By early May, the market, which was unusually volatile, had fallen sharply. As a result, the new charterers were able to negotiate a reduction of the daily rate to \$31,500 in exchange for extending the cancellation date from 8 to 11 May.

The owners held Transfield in breach of the charter and claimed damages, contending that they were entitled to the difference between the original and the renegotiated daily rates. Over the whole period of the new fixture, this brought out a loss of some \$1.36 million. The charterers accepted that the charter had been breached, but contended that the owners could recover only in respect of the nine day period during which the late delivery had deprived them of the use of the ship. On that basis, the owners' loss would be around one tenth of the sum claimed.

At first instance, the case was heard by a panel of three arbitrators, the majority of whom found for the owners on the basis that, as the loss suffered by the owners was of a kind which a charterer experienced in this particular market ought to have appreciated, when entering into the contract, was not unlikely to flow from late redelivery, the owners' losses fell within the ambit of the first limb of the *Hadley v Baxendale* test.<sup>5</sup> The owners also prevailed in the Commercial Court and, by a majority, in the Court of Appeal. By contrast, the House of Lords decided the case in favour of the charterers, holding that the greater part of the owners' loss did not fall within the ambit of the first limb of *Hadley v Baxendale*. As the facts of the case did not disclose a situation which would permit the owners to utilise the second limb,<sup>6</sup> the owners could recover only in respect of the nine days loss of use of their vessel. That, then, was the result. But what was its basis?

<sup>5</sup> *Transfield* at para 28 per Lord Hope, para 80 per Lord Walker.

<sup>6</sup> This might have occurred had the facts been different, e.g. if at the time of entering into their charter, Transfield had the terms of an especially valuable pre-existing but succeeding charter brought to their attention.

## B. THE BASIS OF THE HOUSE'S DECISION

In *Transfield*, Lord Walker notes that some of the difficulties to afflict this area of law stem from the fact that the *ratio* in *The Heron II* remains obscure, as the judges in that case did not say whether they agreed or disagreed with each other.<sup>7</sup> This is a mistake which Lord Walker is keen to avoid in *Transfield*: he expressly approves the judgments of Lords Hoffmann, Hope and Rodger.<sup>8</sup> Indeed, most of the other judges in *Transfield* purport to agree with one another to a greater or lesser extent. Nevertheless, an examination of the judges' speeches appears to disclose three distinct bases for the decision.

### (1) The Hoffmann-Hope Analysis

For Lord Hoffmann (whose judgment is closely mirrored by Lord Hope), the case raises a fundamental point of principle in the law of contractual damages which he formulates thus:<sup>9</sup>

... is the rule that a party may recover losses which are foreseeable ("not unlikely") an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a *prima facie* assumption about what the parties may be taken to have intended ... capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?

Unsurprisingly, given Lord Hoffmann's instrumental role in the erosion of formalism in the English (and probably, by extension, Scots)<sup>10</sup> law of contractual interpretation, he resolves this question by rejecting the "external rule" and favouring a solution based upon "the intention of the parties (objectively ascertained)". This approach is initially advanced not because authority points towards it, but because it is "logical" as "all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone for liable for risks for which the people entering into such a contract in their particular market would not reasonably be considered to have undertaken".<sup>11</sup>

Lord Hoffmann further develops his reasoning by reference to *South Australia Asset Management Corporation v York Montague Ltd.*<sup>12</sup> In *South Australia*, the House of Lords held that a valuer who, in breach of an implied contractual term, negligently advised his banker clients that a particular property was worth significantly more than was the case was not liable for damages occasioned by a subsequent fall in the property market. This was so because such a loss was outside the scope of the liability which the parties would reasonably have considered that the valuer was undertaking. Against the background of *South Australia* and a selection of other,

<sup>7</sup> Para 72.

<sup>8</sup> Para 87.

<sup>9</sup> Para 9.

<sup>10</sup> Lord Bingham of Cornhill, "A new thing under the sun? The interpretation of contract and the *ICS* decision" (2008) 12 *EdinLR* 374 at 385.

<sup>11</sup> Para 12.

<sup>12</sup> [1997] AC 191.

mainly modern, authorities to similar effect,<sup>13</sup> Lord Hoffmann considers the core issue in *Transfield* to boil down not to foreseeability, but to this question: what would the parties have reasonably considered to be the extent of the liability they were undertaking? This he answers by stating that, for reasons connected with the commercial context of the arrangement (most notably, the unquantifiability of the risk)<sup>14</sup> the parties would not have considered losses arising from the loss of the next-coming charter to be of a type for which the charterers would be assuming responsibility.

## (2) Lord Walker's analysis

Lord Walker's judgment takes the form of a detailed analysis of the "classic" authorities on the measure of contractual damages, with particular reference to *The Heron II*. From this, he concludes that the test for liability is a function of degree of probability and "what the contracting parties must be taken to have had in mind, having regard to the nature and object of their business transaction".<sup>15</sup>

## (3) Lord Rodger's approach

Lord Rodger's judgment ends with the statement that although he has "not found it necessary to explore... the issue of assumption of responsibility," he is "otherwise in substantial agreement" with Lord Hoffmann's reasons.<sup>16</sup> Given the centrality of the issue of assumption of responsibility to Lord Hoffmann's judgment, this is a puzzling statement. It is submitted that, in spite of this "agreement", Lord Rodger's approach differs markedly from the Hoffmann-Hope analysis. Lord Rodger's approach is the more traditional. Like Lord Walker, he draws heavily on authorities of long standing, eschewing discussion of *South Australia*.

This approach leads Lord Rodger to disregard the assumption of responsibility of a particular type of loss as the touchstone of liability. Instead, he confines himself to asking whether the loss is of such a nature that it is likely to flow from a breach of contract.<sup>17</sup> If so, it is a loss arising in the ordinary course of events and it may be visited upon the contract breaker. If not (and subject to two caveats)<sup>18</sup> it is a loss for which the party in breach cannot be held responsible as, "other losses not having been in contemplation, the parties had no opportunity to provide for them".<sup>19</sup>

13 Most notably *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* ("The Pegase") [1981] Lloyd's Rep 175 and *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112. Lord Hoffmann does not, however, wholly ignore the "classic" authorities, and refers also to *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528: *Transfield* at para 22.

14 Para 23.

15 Para 78.

16 Para 63.

17 Para 52.

18 Paras 58 and 59. The caveats relate to the situation where it is reasonably foreseeable in advance that late redelivery may well mean that the owner is unable to find a market for his vessel, and the kind of situation discussed at n 6 above.

19 Para 52.

### C. BARONESS HALE'S CRITIQUE

At first sight, the difference between these various formulations may seem relatively subtle. There will be many cases where (as in *Transfield* itself) each of these analyses will give rise to the same end result. However, these differences cannot simply be swept under the carpet. In an extremely insightful but rather unconventional speech, Baroness Hale offers more in the way of a critique of her colleagues' reasons than an enumeration of her own. As she observes, under the Hoffmann-Hope analysis the question is no longer confined to the matter of whether a particular type of loss was (or more properly, ought to have been) in the parties' contemplation. Instead, it is whether *liability* for a particular type of loss ought to have been in contemplation: in other words, "is the charterer to be taken to have undertaken legal responsibility for this type of loss?"<sup>20</sup> This aspect of the analysis concerns Baroness Hale. She considers it to be a novel innovation of which there is virtually no hint in the classic authorities, to be dependent upon a wide range of factors and value judgments (and as such, both a *deus ex machina* and capable of creating uncertainty by opening up room for argument in other commercial contexts) and, once committed to in one context where one would not expect it create problems, potentially capable of creating unforeseen injustices in future cases. She therefore concludes that "if this appeal is to be allowed" – a result as to which she "continues to have doubts" – she would prefer it to be allowed on the basis of Lord Rodger's reasoning.<sup>21</sup>

Baroness Hale does not expressly discuss Lord Walker's analysis. However, it too involves making value judgments, albeit from a different perspective. It would therefore seem to be vulnerable to similar criticisms. Moreover, there are doubts about just how illuminating the nature and object test can be. The nature and object of the charter would appear to be to let the charterer have the use of the ship for a period of time in exchange for making payment therefor. Likewise, the nature and object of the arrangement in *Hadley v Baxendale* was to take a mill's drive-shaft for repair. It is hard to see how much that adds to the question of what level of damages should be paid in the event of a breach. This test may ultimately collapse down to doing what appears to be appropriate in the individual case.

### D. CONCLUSION

What, then, are we to take from *Transfield*? Its irreducible core would seem to be a reaffirmation that, as Lord Reid noted in *The Heron II*, bare foreseeability of loss will not be enough to give rise to an award of contractual damages. There must be something more. Post-*Transfield*, what form must that take? That is where the trouble starts. We are offered three formulations, none of which can safely be said to constitute the *ratio* of the case. To what extent do the differences between the various formulations flow through to impact upon the decision reached? That is the most difficult question of all. Clearly, the differences will not always be determinative. They did not have a bearing upon the end result in *Transfield* itself. Baroness Hale

<sup>20</sup> Para 92.

<sup>21</sup> Para 93.

noted in *Transfield* that the facts of that case “could be an examination question”.<sup>22</sup> One cannot help but feel that, sooner or later, the fates will formulate an even more testing problem for use in the re-sit.

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## Intention to Contract and Wasted Pre-Contractual Expenditure

In *Aisling Developments Ltd v Persimmon Homes Ltd*,<sup>1</sup> the pursuer, which was in the business of identifying development opportunities, had identified land owned by the defender at Newcraighall in Edinburgh as suitable for development as a new campus for Queen Margaret University College (QMUC). The pursuer suggested purchasing 70 acres of this land from the defender, half of which the pursuer would transfer to QMUC for the proposed development. However, as the negotiations proceeded, QMUC indicated that it preferred to acquire its share directly from the defender. The pursuer was to continue with the purchase of the other 35 acres, and to remain involved in the development project. A meeting was held in March 2002 between the three parties to discuss the new proposal. At this meeting, the defender indicated it was willing to sell 35 acres to the pursuer for £4.55 million, terms which were agreeable to the pursuer. Over the succeeding four years the pursuer and defender exchanged a number of communications, including “Draft Heads of Terms” of agreement. They also discussed missives of sale (which, at several points in time, the defender assured the pursuer would be imminently concluded) as well as the identification by the pursuer of a so-called “big brother” commercial partner to assist it with the development. Despite the pursuer eventually identifying such a big brother, and the defender’s assurance on a number of occasions that no serious issue stood in the way of the envisaged sale or the wider project, the defender eventually informed the pursuer in September 2006 that it was “withdrawing from negotiations” to sell the 35-acre site to the pursuer. By this point, the pursuer had expended in excess of £500,000 in the continued expectation of involvement in the project. On receiving the defender’s communication, the pursuer intimated that it took the view that a binding agreement already existed between the parties and therefore that the defender could not withdraw from the contract.

<sup>22</sup> Para 89.

<sup>1</sup> [2008] CSOH 140.



The case as pled by the pursuer was that a contract of sale, albeit an oral one, was concluded by the parties at the March 2002 meeting. Although this agreement was not in the form required by the Requirements of Writing (Scotland) Act 1995, the pursuer argued that the subsequent actings of the parties fulfilled the personal bar requirements of sections 1(3) and (4) of the Act, thus purifying the defect in form. An earlier approach, that the actings of the parties subsequent to the meeting had concluded the contract, was not eventually pled, although such actings were argued to be relevant in determining the intention of the parties as at the meeting. There was no *esto* case based either upon the bad faith of the defender (as might be demonstrated by the defender stringing the pursuer along) or upon the line of cases following *Walker v Milne*<sup>2</sup> permitting recovery for wasted pre-contractual expenditure. The defender argued that the parties had not intended to reach any binding contractual agreement at the meeting, nor had it said anything to the pursuer which would have led it reasonably to believe that such a contract had been concluded at that meeting. Furthermore, as all matters considered essential to the arrangement had not been agreed, including how infrastructure costs were to be shared or who was to act as the pursuer's "big brother" in the project, there could be no contract.

#### A. THE DECISION

Lord Glennie first considered the related questions of whether the parties had demonstrated an intention to be contractually bound and whether, if so, all the terms necessary for a contract had been agreed. Citing *May & Butcher v R*,<sup>3</sup> he reiterated that parties must agree on all the essentials before a contract can be concluded, albeit that what is "essential" depends on the nature of the intended contract. However, Lord Glennie added that, in cases where performance has occurred, even if some matter which one might normally expect to have been settled (e.g. price) is absent, a court will be slow to hold no contract was concluded; rather it will imply a term, as happened in *R & J Dempster v Motherwell Bridge*.<sup>4</sup> Lord Glennie further cited the decision of the New Zealand Court of Appeal in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* for the point that assessing intention to contract "cannot sensibly be divorced from a consideration of the terms express or implicit".<sup>5</sup> Nor, said Lord Glennie, can one, in assessing such contractual intention, ignore whether parties envisaged that their agreement would be committed to writing, although such an understanding would not necessarily prevent a preceding oral agreement from having contractual force.

Applying these authorities, Lord Glennie decided that the pursuer and defender had not concluded a contract at the crucial meeting. In reaching this view, he rejected the defender's contention that outstanding matters to be agreed between the parties necessarily prevented a contract from coming into being. What was crucial, Lord Glennie said, was the prior question of whether the parties had so

<sup>2</sup> (1823) 2 S 379.

<sup>3</sup> [1934] 2 KB 17.

<sup>4</sup> 1964 SC 308.

<sup>5</sup> [2002] NZLR 433 at para 50 per Blanchard J.

conducted themselves “as to lead the other reasonably to conclude that they had made . . . an agreement”.<sup>6</sup> They had not. Not only had neither party attended the meeting intending to reach a binding agreement at it, but, at the conclusion of the meeting, “neither believed that a concluded agreement had been reached”.<sup>7</sup> In stating this conclusion, Lord Glennie had regard to the overall context of the dealings between the parties. These were commercial parties who would have known that a contract to sell land required formal writing. Given that no such writing had been executed at the meeting, this tended to suggest (albeit not conclusively) that the parties did not consider themselves bound by the oral discussions. Furthermore, although the tenor of the discussions at the meeting led the pursuer to believe that a contract would be concluded, a “commitment, or an assurance is one thing, a concluded agreement is quite another”.<sup>8</sup> While a certain price and subjects had been discussed at the meeting, these details had actually been settled before the meeting; the meeting thus added nothing, but merely changed the structure of the project, which, his Lordship concluded, made it less likely a binding agreement was intended. Additionally, while the defender had “strung the pursuers along”<sup>9</sup> by repeatedly suggesting that nothing crucial remained to be settled, his Lordship felt that the protracted negotiations disclosed that the pursuer did not consider a binding contract was in place between the parties. There are clear comparisons here with the behaviour of the parties in an earlier case, *W S Karoulias v The Drambuie Liqueur Co Ltd*.<sup>10</sup>

Given that Lord Glennie felt that no intention to contract was present, it was strictly unnecessary to consider any argument based upon statutory personal bar under sections (3) and (4) of the Requirements of Writing Act. Because those provisions require that a contract, albeit in defective form, be present before statutory personal bar can be pled, if there is no contractual intent, the provisions cannot apply. Lord Glennie added the *obiter* observation, that, had he considered contractual intention to be present, he would probably have held personal bar applicable, given the presence of detrimental reliance by the pursuer and knowledge and acquiescence by the defender.

## B. DISCUSSION

On the point of whether the parties intended a contract to be concluded at the meeting in March 2002, Lord Glennie’s conclusion seems correct. Agreement on parties, subject and price, is not necessarily sufficient to demonstrate contractual intent. The behaviour of the pursuer subsequent to the crucial meeting, in continuing to engage in protracted negotiations and insisting on written missives being concluded between the parties, objectively suggested that it did not consider a contract to have been concluded by virtue of the discussions at the meeting. As this was the only basis

<sup>6</sup> *Aisling* at para 56.

<sup>7</sup> Para 57.

<sup>8</sup> Para 59.

<sup>9</sup> Para 62.

<sup>10</sup> [2005] CSOH 112, 2005 SLT 813.

upon which a contract case was pled, the contractual argument properly fell. One might debate whether, tactically, the pursuer should have pled a contract case based upon the subsequent negotiations of the parties, but, given that these had proven inconclusive, one can see why the more confined discussions of the March 2002 meeting were thought to provide a better argument in favour of contract.

A further tactical question is whether an *esto* case based either upon lack of good faith on the defender's part or wasted pre-contractual expenditure should have been maintained. As to the first, such a claim would have been most unlikely to have succeeded. It is certainly true that in a number of Continental legal systems, stringing a negotiating party along only to terminate contractual negotiations suddenly and without good reason (as seems to have been the case in *Aisling*) would be deemed in breach of a duty of good faith.<sup>11</sup> As such it would give rise to damages for wasted expenditure or even, in some cases, to circumstances where the defaulting party was forbidden from withdrawing from the intended agreement (as can be the case under Dutch law). Such a position does not however prevail in Scotland, where contractual good faith presently has a more limited function. One such function is, arguably, in providing a rationale for the liability established in *Walker v Milne*<sup>12</sup> and later cases for the recovery of wasted pre-contractual expenditure (in *Aisling* this amounted to half a million pounds wasted by the pursuer).<sup>13</sup> The basis of this liability, as explained in *Dawson International plc v Coats Paton plc*, is for:<sup>14</sup>

reimbursement of expenditure by one party occasioned by the representations of another... where the former acted in reliance on the implied assurance by the latter that there was a binding contract between them when in fact there was no more than an agreement which fell short of a binding contract.

In *Walker* the liability was held applicable to wasted expenditure in contemplation of a contract relating to land; the potential applicability of the remedy to the facts of *Aisling* will be obvious. The difficulty, however, in applying the remedy to *Aisling* would have lain in the two requirements noted by Lord Cullen: the presence of an implied assurance that a binding contract was in place, and the existence of an "agreement" (albeit defective) between the parties. In *Aisling* the defender had led the pursuer to believe that a contract would eventually be concluded between the parties, but it does not appear to have assured the pursuer at any time that a binding contract was already in place. Furthermore, although the parties had agreed the basic terms of the proposed sale, Lord Glennie's finding that they had not demonstrated sufficient intention to contract, even orally, would have precluded any finding that

11 Note also the Draft Common Frame of Reference, art II-3:301(3): "A person who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for any loss caused to the other party to the negotiations." (C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (interim outline edition, 2008); also available at e.g. <http://webh01.ua.ac.be/storme/DCFRInterim.pdf> or [http://www.law-net.eu/en\\_index.htm](http://www.law-net.eu/en_index.htm)).

12 (1823) 2 S 379.

13 Although it should be noted that this figure, quoted by Lord Glennie, was for wasted expenditure relating to the project as a whole, not simply to the expected land purchase.

14 1988 SLT 854 at 866A per Lord Cullen.

an “agreement” existed between them. While then *Walker v Milne* might have been pled, it is very unlikely that the plea would have been successful. One might argue that this indicates the need for some judicial development of the remedy. Such development might fill a perceived equitable need which cannot be met by unjustified enrichment. While enrichment is useful in cases like the English appeal *Cobbe v Yeoman’s Row Management Ltd*,<sup>15</sup> where the House of Lords allowed recovery in *quantum meruit* for wasted pre-contractual expenditure, it is a solution which is less evidently applicable in a case like *Aisling* where it is hard to see how the pursuer could be said directly to have enriched the defender.

### C. CONCLUSION

The decision in *Aisling* is a reminder of the dangers of undertaking substantial expenditure in the expectation of a contract being concluded without first putting in place any mechanism for the recovery of such expenditure if the negotiations fail. Scots law lacks any clear means of penalising the negotiating party who, in bad faith, strings another along to its financial detriment. Whilst the law may eventually develop a doctrine of good faith which might be utilised to provide compensation in such cases, currently the cautious contracting party will make stringent efforts to ensure that a contract is in place before embarking on extensive expenditure. The decision is also a reminder that mere agreement on basic contractual terms is not to be confused with objective intent to be bound at law; it is the latter which is crucial in determining whether a contract has been concluded.<sup>16</sup>

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## A Common Law of Passing-Off? English and Scottish Perspectives

The starting proposition for the common law of passing-off is that one may not pass off one’s goods or services as those of another’s. The law, as summarised in the English *Jif Lemon*<sup>1</sup> and *Advocaat*<sup>2</sup> cases, is applied in much the same way in England and in

<sup>15</sup> [2008] UKHL 55, [2008] 1 WLR 1752.

<sup>16</sup> The provisions of the Draft Common Frame of Reference (n 11) may again be noted, especially the emphasis placed upon the intention to be bound. See art II-1:101(1): “A contract is an agreement which gives rise to, or is intended to give rise to, a binding legal relationship . . .”.

<sup>1</sup> *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491. See B. below.

<sup>2</sup> *Erven Warnink v Townend* [1979] AC 731. See C. below.

Scotland.<sup>3</sup> However, it hails from different traditions and different rationales which inform the boundaries of the law in the two jurisdictions. For example, under the English law of passing-off, the protection of one's name or image from third-party use has been limited until recently.<sup>4</sup> The Scots law, founded on the principles of personality rights, affords a more sympathetic treatment.<sup>5</sup> The recent case of *Wise Property Care Limited v White Thomson Preservation Ltd*<sup>6</sup> provides a backdrop for illustrating that the underlying rationales of the law are not as distinct as they appear.

### A. THE RATIONALES

In England, passing-off is traditionally treated as trade deception. Initially, trade mark claims could be construed in property terms, but by 1915 the property right settled on the goodwill underlying a mark.<sup>7</sup> Goodwill is seen as the distinctive character of a business which attracts custom to the trader. The law is justified as protecting consumers from trade deception and as ensuring fair competition among traders. Trade marks distinguish a trader's goods and services, and cultivate a goodwill distinctive from that of other traders. Trade marks lead consumers to their desired sources and qualities of goods or services; traders can then dedicate resources toward production that matches consumer demand; economic efficiency may thereby be achieved. The law against passing-off is often classified as an economic tort.

In Scotland, the law "is based on the general right which everyone possesses not to have published, about him or his goods, statements which are both untrue and prejudicial to his pecuniary interests".<sup>8</sup> Stair specified the right to fame, reputation and honour as a protected right under the Scots law of delict.<sup>9</sup> The Scots law of passing-off aims to protect one's goodwill.<sup>10</sup> The literature generally classifies the law as a delict relating to property, business goodwill being incorporeal moveable property under Scots law.<sup>11</sup> Unfair competition has been suggested,<sup>12</sup> but not adopted, as a basis for the law.<sup>13</sup>

3 H L MacQueen "Intellectual property", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993) para 1362; *Lang Brothers Ltd v Goldwell Ltd* 1980 SC 237; *Wise Property Care Ltd v White Thomson Preservation Ltd* [2008] CSIH 44.

4 See e.g. *Clark v Freeman* (1848) 11 Beavan 112, 50 ER 759; *McCulloch v May* [1947] 2 All ER 845; *Lyngstad v Anabas* [1977] FSR 62; in *Hines v Winnick* [1947] Ch 708, a case involving no transformative use of a pseudonym, the plaintiff succeeded. See also *Irvine v Talksport Ltd* [2002] EWHC 367, [2002] 1 WLR 2355 at para 32.

5 *Wilkie v McCulloch & Co* (1823) 2 S 413, (NS) 369.

6 [2008] CSIH 44, 2008 GWD 28-440.

7 *A G Spalding & Bros v A W Gamage Ltd* [1914-15] All ER 147.

8 E Clive "The action for passing off" 1963 JR 117 at 134.

9 *Inst* 1.9.4.

10 *Haig & Co v Forth Blending Co* 1954 SC 35.

11 D M Walker, *The Law of Delict in Scotland*, 2<sup>nd</sup> edn (1981) 1023; D M Walker, *Principles of Scottish Private Law*, 4<sup>th</sup> edn vol III (1989) 9, 333 and 511ff; MacQueen (n 3) para 1364.

12 Q Stewart "The law of passing-off—a Scottish perspective" (1983) 3 *European Intellectual Property Review* 64.

13 MacQueen (n 3) para 1364.

## B. THE CASE

*Wise Property Care Limited v White Thomson Preservation Ltd*, an action for an interim interdict, provides a backdrop for illustrating that the common tests for passing-off for England and Scotland have little, if any, basis in consumer protection or fair trading, as has often been contended for in England.<sup>14</sup> The chronology of events is set out in the chart on the following page.

In a reclaiming motion against a refusal to recall interim interdict, the Inner House affirmed a finding of passing-off. Between the parties, the identity in trade (investigating and treating dry rots, rising damp, woodworm and related problems) and in trading territory (Fife and Kinross) and the similarities in names (see chart) and in addresses (defender company 1: 14; pursuer: 22, both Viewfield Terrace, Dunfermline) were found sufficiently likely to cause confusion among the relevant public.

The Inner House affirmed the Lord Ordinary's view that damage to the pursuer was likely under the *Jif Lemon* test for passing-off:

1. the pursuer had a goodwill to protect;
2. there was a misrepresentation by the defenders to the public (whether or not intentional) leading or likely to lead the public to believe that the services offered by the defenders were those of the pursuer; and
3. the pursuer was suffering, or likely to suffer, damage by reason of the erroneous belief engendered by the defenders' misrepresentation.<sup>15</sup>

## C. REVIEWING THE RATIONALES

Of greater interest is the argument which was raised but not addressed: had the action failed on the basis of a dissimilarity in the parties' names, would any recourse have been available under the law of passing-off against any attempt by the defender companies to hold themselves out as, in effect, successors to Thomas White's discontinued business, or to suggest a strong connection with it? No.

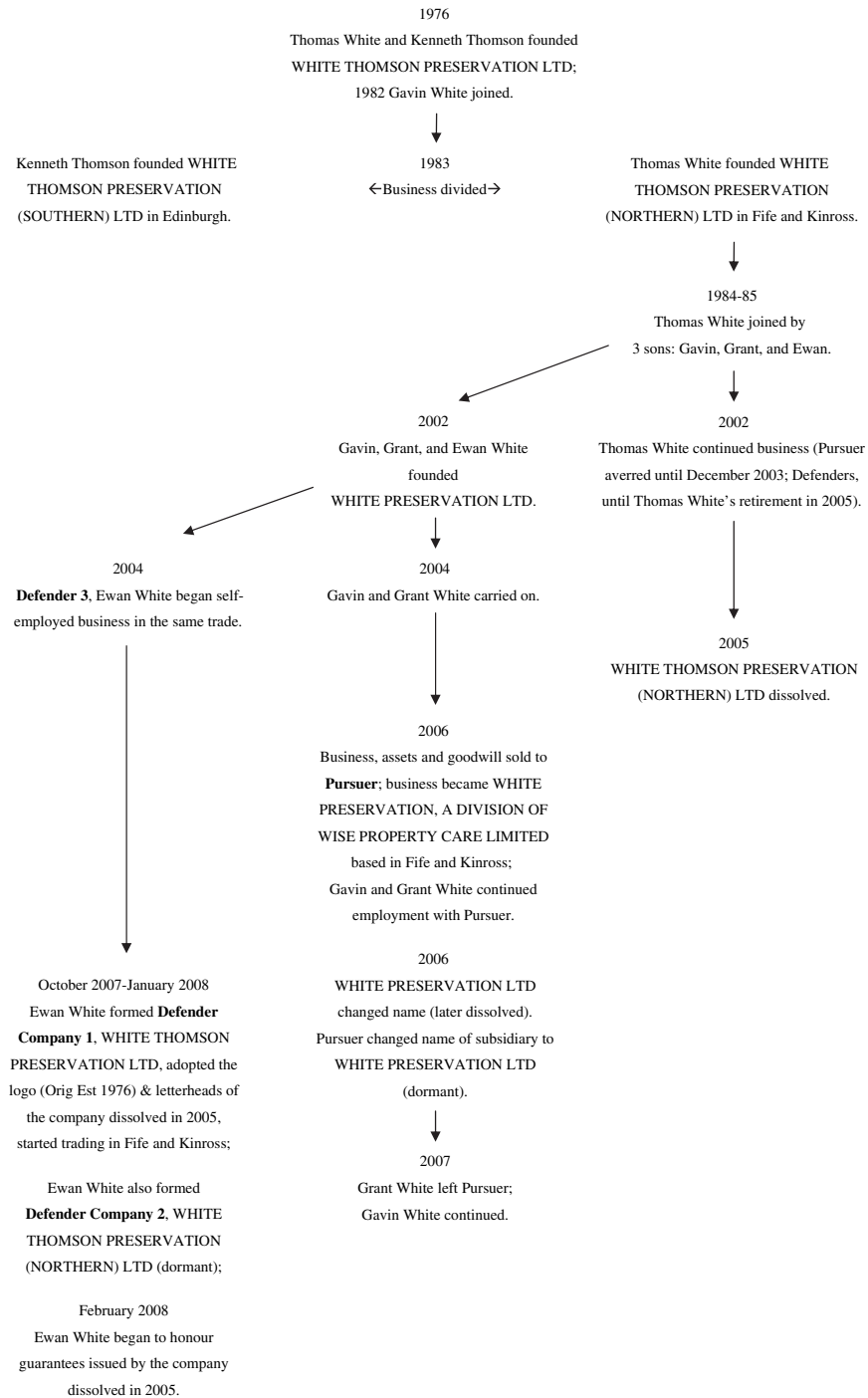
The law of passing-off would not intervene at the consumers' behest. Only Thomas White's company, had it not dissolved, would have had a right of action to complain of any consumer confusion which might have arisen from any perceived revival of the business.<sup>16</sup> Furthermore, while the law would examine the descriptiveness of the marks to determine the goodwill attributed to them and compare them as between the parties to determine any misrepresentation likely to lead to confusion between the parties,<sup>17</sup> the use of "Orig Est 1976" in the logo of a company established in 2007 was

<sup>14</sup> See also C W Ng "The irrational lightness of trade marks: a legal perspective", in L Bently, J Davis and J Ginsburg (eds), *Trade Marks and Brands* (2008) 515.

<sup>15</sup> *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 at 499 per Lord Oliver of Aylmerton.

<sup>16</sup> *Ad-Lib Club Limited v Granville* [1971] 2 All ER 300; *Sutherland v V2 Music Ltd* [2002] EWHC 14, [2002] All ER 156.

<sup>17</sup> *Bowden Wire Ltd v Bowden Brake Company Ltd* (1913) 30 RPC 580 at 618.



beyond reach of the law of passing-off.<sup>18</sup> The protection of consumers from confusion does not appear a paramount concern of the law.

Unfair competition also does not appear a primary concern. While the law of passing-off protects the pursuer's name and goodwill from exploitation, it would not protect the pursuer from the defenders' revival of a goodwill stronger than its own. The pursuer's lineage traced to 2002, while defender company 1's logo read "Orig Est 1976" and defender company 2 adopted the name of a company founded in 1983. The pursuer purchased the goodwill initiated by Gavin, Grant, and Ewan White under their family name. The defender Ewan White partook for some 17 years in the operation, and likely in the building of the goodwill, of the original White Thomson Preservation (Northern) Ltd, a name now claimed by his defender company 2. Notwithstanding, the law of passing-off would view the defender companies as potentially exploiting the goodwill created in another's company, reaping where the defender companies had not sown. Without the intervention of that other company in which the goodwill resided, however, the competing pursuer had no recourse under the law.

The law grants recourse only to those whose goodwill is directly engaged or implicated by the offending act.<sup>19</sup> In the *Jif Lemon* test, one requirement is "a misrepresentation by the defendant to the public ... leading or likely to lead the public to believe that the goods or services offered by him are *the goods or services of the plaintiff*".<sup>20</sup> In *Advocaat*, Lord Diplock required for a case to be actionable under passing-off:<sup>21</sup>

(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of *the trader by whom the action is brought* or (in a *quia timet* action) will probably do so.

Likewise, Lord Fraser required:<sup>22</sup>

(1) that *his [the plaintiff's] business* consists of, or includes, ... a class of goods to which the particular trade name applies; (2) that the class of goods is clearly defined, and that in the minds of the public, ... the trade name distinguishes that class from other similar goods; (3) that because of the reputation of the goods there is goodwill attached to the name; (4) that *he, the plaintiff, as a member of the class of those who sell the goods*, is the owner of goodwill in England which is of substantial value; (5) that *he has suffered, or is really likely to suffer*, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached.

18 Unless as a part of the publicity narrative, the phrase contributes to consumer confusion: *I N Newman Ltd v Adlem* [2005] EWCA Civ 741, [2005] All ER 228.

19 *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1999] All ER 205.

20 *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 at 499 per Lord Oliver of Aylmerton (emphasis added).

21 *Ercen Warnink v Townend* [1979] AC 731 at 742 (emphasis added).

22 At 755-756 (emphasis added).



The Scottish Law Lord noted in passing that the justification for the passing-off action was to protect the appellants' property in the goodwill.<sup>23</sup>

The law of passing off therefore does not prohibit unfair competition in absolute terms: that is, misrepresentation using a guise other than that of the pursuer's or the pursuer's class. Nor does it prohibit unfair competition in relative terms: that is, where such misrepresentation gives the defender an advantage over the pursuer or its class.<sup>24</sup> The law intervenes only where direct harm to the goodwill of the pursuer or its class would result. In reverse passing-off, where a pursuer's identity on goods or services is obliterated and sometimes replaced with another's, the pursuer is deprived of the opportunity to trade under its own identity and to develop its goodwill.

#### D. CONCLUSION

Neither consumer protection nor protection from unfair competition appears sustainable as a rationale for the law against passing-off. Both are mere incidental and occasional outcomes of the action. Recent English application of the law to protect certain personality rights accepts that "[w]hat is protected is goodwill",<sup>25</sup> reminiscent of the Scots foundation of the law: the right to fame, reputation and honour.<sup>26</sup>

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## The Struggle for Recognition of New Servitudes

After *Moncrieff v Jamieson*<sup>1</sup> and perhaps emboldened by the, albeit limited, success of that case in establishing the servitude of parking comes another attempt to establish a new servitude in Scots law. The case which raised the issue, *Romano v Standard Commercial Property Securities Ltd and Atlas Investments Ltd*,<sup>2</sup> does so in a rather unexpected way, not as a direct claim to enforce the alleged servitude, but as a basis for a claim for compensation under a compulsory purchase order. The case is a spin-off from the saga of Glasgow City Council's attempts to see to the re-development

<sup>23</sup> At 754.

<sup>24</sup> *Schulke & Mayr UK Ltd v Alkapharm UK Ltd* [1999] FSR 161; C Wadlow, *The Law of Passing-Off*, 3<sup>rd</sup> edn (2004) 569.

<sup>25</sup> *Irvine v Talksport Ltd* [2002] EWHC 367, [2002] 1 WLR 2355 at para 32.

<sup>26</sup> Stair, *Inst* 1.9.4.

<sup>1</sup> [2007] UKHL 42, 2008 SC (HL) 1.

<sup>2</sup> [2008] CSOH 105, 2008 SLT 859.

of property in the north of Buchanan Street, which are chronicled in *Standard Commercial Property Securities Ltd v Glasgow City Council*.<sup>3</sup> The outcome of that earlier case was that the second defenders became preferred developers of property including the subjects to which this dispute relates, Nos 203-213 Buchanan Street, and a compulsory purchase order was made to allow the re-development to take place. This triggered claims for compensation from parties interested in the property, including the pursuer as owner of the basement flats in the two tenements Nos 203-205 and Nos 209-213, the second defenders as owners of the upper flats in Nos 203-205, and the first defenders as owners of the ground-floor flat in Nos 209-213. The pursuer was claiming that in addition to his right as owner he had a “heritable right” to erect a shop front and fascia extending over part of the property of the first defenders. What the value of that right might be to justify a Court of Session action to vindicate it, except as some sort of ransom strip, is not clear.

#### A. THE FACTS OF THE CASE

Both tenements were originally owned by the Life Association of Scotland but they were disposed of in lots to separate parties. To simplify the titles a single deed of conditions was entered into by the various proprietors and this specified *inter alia* that all external and bearing walls were common property (as presumably the individual titles had provided). It also placed limitations on the display of business signs without consent of a majority in number, representing at least three-quarters of the whole votes. These provisions might have been designed to cause problems (the difficulties with common property being one reason why the Tenements (Scotland) Act 2004 does not extend common property as at one time suggested by the Scottish Law Commission) but the problems which might have been expected did not materialise in the course of very considerable changes to the façade of Nos 201-213 over the years. The later changes are illustrated by photographs inserted in the court’s opinion, which also contains plans of the original layout of both tenements. In 1962, as part of the process of change, the ground floor and basement of Nos 209-213, then jointly owned, were divided between the two proprietors, the basement flat being granted and the ground-floor flat being made subject to “a servitude right and privilege. . . to attach a shop front including fascia” overlapping the boundary between basement and ground floor. The object was to provide for an Italian restaurant which, however, closed in 1976. No consent of the other common owners of the external wall was sought or given.

From 1989 the basement and ground floor were occupied by a single tenant holding from the owners of both flats and from the 1990s the frontage of these flats was considerably changed. The basement floor windows were closed up and the only signage for the business was on the ground floor. The changes were not objected to by the other common owners. The first defenders obtained their title to the ground-floor flat in 2001 and their title was stated to be subject to the burden of the servitude right purportedly created in 1962 but presumably so far as valid, subsisting and still

3 [2006] UKHL 50, 2007 SC (HL) 33.

enforceable, as is usually provided in a burdens clause. In this case there was the problem that one common owner cannot create a servitude (or real burden) affecting the common property without the consent of the others.

## B. THE DECISION AND DOUBTS

The defence that the pursuer had no title or interest to bring his action was easily dismissed, leaving the question whether he had the “heritable right” which he claimed in the conclusions of his action and which he specified in his pleadings as a servitude. Lord Carloway held that there was no servitude of “shop front” in Scots law. He quoted with approval the statement of the sheriff in *Mendelsohn v The Wee Pub Co*<sup>4</sup> that:

Shop signs would seem to have been known in classical times. They were certainly known in the Old Town of Edinburgh where [the close] is situated and are I think no new response to the needs of a changing society. I have concluded that had such a servitude right existed, as is claimed by the defender[s] in this case, it would have been recognised by the authorities centuries ago.

with the remark that “[i]t is impossible to fault the Sheriff’s reasoning which is equally applicable to the servitude right claimed here”.<sup>5</sup>

However, there do appear to be faults in the sheriff’s reasoning. One is that pointed out by Lord Rodger in *Moncrieff v Jamieson* in relation to parking,<sup>6</sup> to which the same objection could be made, namely, that the absence of a named servitude from the classical texts may result from the selection made by Justinian’s compilers. Another is that the relevant Roman law to be considered is not the law of Justinian, far less that of the classical period, but the civil law developed on the basis of the Justinianic texts and this was not apparently explored. A third is that a right to have a sign was recognised as ancillary to a right of access in *Cunningham v Stewart*<sup>7</sup> and in the earlier case of *Walker’s Trs v Learmonth & Co*,<sup>8</sup> pointing to a recognised need. In this respect one might also point to the English case of *Moody v Steggles*,<sup>9</sup> allowing an easement of display of a public house sign, particularly as the law of easements and the law of servitudes share a common root in the civil law, although Lord Carloway is properly cautious of relying on an English authority without a “qualified understanding” of the relevant law.<sup>10</sup> A fourth is that the *obiter* but often quoted remarks of Lord Gifford in *Alexander v Butchart*,<sup>11</sup> a case which seems to have been mainly relied on in *Mendelsohn*, are simply a statement of the general principle that servitudes

4 1991 GWD 26-1518.

5 *Romano* at para 26.

6 [2007] UKHL 42, 2008 SC (HL) 1 at para 73.

7 (1888) 4 Sh Ct Rep 255.

8 (1824) 3 S 288, (NS) 202.

9 (1879) 12 Ch D 261.

10 *Romano* at para 28.

11 (1875) 3 R 156 at 160.

must be known to the law or akin to known servitudes. But the basic reason for the acceptance of this principle in Scots law is that prospective purchasers should not find themselves burdened with unexpected rights which do not need to appear in their titles and so may not be obvious. Something as visible as a shop sign, and even more so, a shop front and fascia is hardly one that should go unnoticed by a prospective purchaser and the question is not simply what servitudes are recognised but what servitudes should be recognised. Is it not principle that matters in Scots law and not only precedent?

One may also note two things. First, the servitude referred to “a shop front and fascia” and one can well see objection to such a right as an undue restriction of ownership, making it impossible for it to be created even under that encouragement to the creation of new servitudes, section 76 of the Title Conditions (Scotland) Act 2003. But what seems actually to have been meant was a right to encroach to a limited extent above the normal boundary between the basement and ground-floor flats. This is closely analogous to the situation in *McArly v French's Trs*<sup>12</sup> where it was held by a court that included Lord Rutherford Clark, who also sat in *Alexander v Butchart*, that a cornice and shop sign projecting above the boundary line between two flats, which had been in position for over forty years, should not be removed. Although Lord Carloway rightly states that the reason given why it should not be removed was that it had become a part and pertinent of the lower flat and not that there was a servitude allowing it to remain,<sup>13</sup> the decision in effect recognises the Roman and civil law servitude of projecting part of one's building over the property of a neighbour, the *jus projiciendi vel protegendi*.<sup>14</sup>

Secondly, having rejected a servitude of shop front, Lord Carloway went on to consider the pursuer's claim that, although the grant to him was in fact invalid because made by only one of the common owners, he had acquired a title by prescription because the grant was *ex facie* valid and had been followed by possession. The pursuer's averments of use of the shop front for the prescriptive period on the basis of the grant were insufficient and his case fell as irrelevant. Nevertheless it seems inconsistent to deal with the issue at all if the right claimed as a servitude could not exist in law.

### C. A FINAL OBSERVATION

One final point which arises from this case is whether the rules on common property are too restrictive. It seems clear that the only common owners with any real concern

12 (1883) 10 R 574; *Moody v Steggles* (1879) 12 Ch D 261 was cited.

13 *Romano* at para 25.

14 See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 3.22, implicitly rejecting the rather scandalised comments of J Rankine, *The Law of Landownership in Scotland*, 4<sup>th</sup> edn (1909) 136 on the case, but the Digest text cited in their n 18 should be D 8.2.2 rather than D 8.2.17. See also Vinnius, *Comm ad Inst.* 2.3.1, n 3 and Voet, *Comm ad Pandectas* 8.2.3, and for South African law, C G van der Merwe and M J de Waal, “Servitudes”, in W A Joubert et al, *Law of South Africa*, First Reissue, vol 24 (2000) para 417.

over a shop front extending beyond the boundary between the basement and ground floor of Nos 209-213 were the owners of the ground floor. As the law stands it is technically correct to say that the purported servitude was invalid but this does not seem altogether reasonable. However the case is clearly a warning of the dangers of overlooking rights of common property in dealing with tenements.

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## Bequests of Residue and Crofting Tenancies: *Gardner v Curran*

*Gardner v Curran*,<sup>1</sup> a decision on succession to a croft, is an unusual case because the question of law did not turn on the complexities of statutory interpretation for which this area of law is notorious but on more general issues about the construction of wills—specifically, the nature, scope and effect of residuary legacies, with the emphasis on ascertaining the intention of the testator. The relative simplicity of these concepts is in direct contrast to an area of law as tightly and technically regulated as this one. It was, however, this very simplicity that was the means by which the sheriff principal (Sir Stephen Young) agreed with the pursuer that, contrary to the landlord's claim that the bequest of an interest under a lease had to be specific, the testator's widow was entitled to succeed to it in accordance with the clear intention of the testator. The case is also noteworthy for its formulation of a principle that distinguishes quite clearly the position of crofters from that of agricultural tenants generally.

The deceased had been a tenant of a croft in Caithness and made a will in which the sole substantive provision was to give the residue of his estate to his widow. The widow sought declarator that the tenancy of the croft passed to her as part of the residue and in accordance with section 10(1) of the Crofters (Scotland) Act 1993,<sup>2</sup> which provides that a crofter may, by will or other testamentary writing, bequeath the tenancy of his croft to any one person who is a member of his family.<sup>3</sup> The landlord argued that the bequest was invalid for not having referred specifically to the tenancy.

<sup>1</sup> 2008 SLT (Sh Ct) 105.

<sup>2</sup> Section 16(1) of the Succession (Scotland) Act 1964 was also cited but the technicalities will not be examined here as they were not directly relevant to the decision. Minor amendments to succession to crofts were introduced by the Crofting Reform (Scotland) Act 2007 which came into force on 28 January 2008 but the provisions of the 1993 Act applied in this case.

<sup>3</sup> "Family" includes a spouse: Crofters (Scotland) Act 1993 s 61(2).

At first instance, the sheriff repelled the defender's plea and allowed a proof on the parties' averments. This decision was appealed to the sheriff principal.

#### A. THE PARTIES' SUBMISSIONS

Counsel for the pursuer argued that the question of the validity of the bequest was purely one of construction of the will in light of the relevant statutory provision. The correct approach was first, to ascertain what had been the testator's intention so far as this could be discerned from within the four corners of the will; and secondly, if the court was satisfied that the testator had intended to dispose of the tenancy of his croft, to determine whether or not he had succeeded in doing so. There was nothing in section 10(1) of the 1993 Act which either expressly or impliedly required a specific bequest in the technical sense of that term—in other words a legacy which made express mention of the croft—in order to carry the tenancy. To interpret the section as requiring a specific bequest would be to impose an additional technical restriction on the tenant's ability to bequeath his tenancy which Parliament had not seen fit to impose. A will which bequeathed the entirety of a crofter's estate by way of a residuary bequest to one person who was a member of the crofter's family satisfied the requirements of section 10(1).

Counsel for the defender argued that section 10(1) required a specific bequest of the croft to a specific person, failing which the tenancy would fall into intestacy. He cited *Kennedy v Johnston*,<sup>4</sup> where the testator had conveyed his whole estate to trustees, directing them to hold the residue in liferent for his widow and to his sons in fee. The question for the court was whether the bequest included the lease of an agricultural tenancy. The court held that since section 20 of the Agricultural Holdings (Scotland) Act 1949 required a bequest to "a person" of the lease of the holding, the provisions made by the testator were "very different from a specific bequest of the lease to a definite individual".<sup>5</sup> Since trustees could not be "legatees" within the meaning of the Act, and a bequest of residue to his widow in liferent and his children in fee could not be construed as a bequest to any specific individual, the bequest of residue could not include the lease. In *Reid's Trs v Macpherson*,<sup>6</sup> the tenant had disposed of his whole estate "over which I may have the power of control or disposal at the time of my death", with a direction to pay the residue to his wife, whom failing his son. Notwithstanding his right under section 20 to bequeath the lease to a member of his family, the court held that he had no power of disposal at the time of his death since the lease was subject to a special destination to his heirs to which preference must be given. Lord Grieve agreed with Lord Clyde in *Kennedy* that the provisions of section 20 "could only apply to a direct bequest of a lease to a specific person".<sup>7</sup> Accordingly, the bequest of residue did not carry the lease but fell to intestacy.

<sup>4</sup> 1956 SC 39.

<sup>5</sup> At 46 per Lord President Clyde.

<sup>6</sup> 1975 SLT 101.

<sup>7</sup> 1975 SLT 101 at 109. The Agricultural Holdings (Scotland) Act 1991 s 11 now confers a power of bequest similar in terms to that of the Crofters (Scotland) Act 1993 s 10.

## B. THE DECISION

The sheriff principal first considered the nature of residue. A bequest of residue, broadly framed, operates to carry the whole estate, including any legacies that have lapsed for whatever reason, to the residuary legatee. As McLaren notes, “[n]o particular form of words is requisite to the effectual constitution of a destination of residue”<sup>8</sup> and the nature of a residuary bequest is that it is simply “the entirety of the estate not required for the antecedent purposes of the will, including debts and legacies”.<sup>9</sup> Often, a bequest of residue is the “ultimate purpose of the settlement”.<sup>10</sup> Its purpose is pragmatic: to “sweep in everything not effectually disposed of”<sup>11</sup> in order to avoid intestacy where other provisions of the will fail. Partial intestacy is thus impossible, unless the residuary legatee fails and this contingency has been overlooked by the testator.

The sheriff principal then went on to observe that as well as begging the questions of what a “direct bequest of a lease to a specific person” or a “valid bequest” might mean, Lord Clyde’s remarks in *Kennedy* were *obiter* and did not provide authority for the contention that only a specific bequest to a specified person would satisfy the section. In any event, it seemed clear that their meanings must be encompassed within any definition of a residuary bequest, since such a bequest was made to a specific person and, moreover, was direct.<sup>12</sup> The defender had also cited *Cochrane’s Executors v Inland Revenue*<sup>13</sup> to argue that, since a residuary legacy could not give rise to a right in the residuary legatee to receive any particular item of property out of the deceased’s estate, as antecedent purposes of the will required to be fulfilled before the residue could be ascertained, the result was that section 10(1) required a specific bequest of the tenancy. The sheriff principal held that the case was irrelevant as in the instant case there were no antecedent purposes sufficient to defeat the purposes of the will. As he observed, “it is one thing to say that a valid bequest has been defeated in order to satisfy an antecedent purpose in a will and quite another to say, as the defender does in this case, that there has been no valid bequest in the first place”. Furthermore, even if there had been a specific bequest of the tenancy, the same situation could have arisen.<sup>14</sup>

The essence of the sheriff principal’s rejection of the defender’s position was that, leaving aside the somewhat opaque expositions of the law put forward in the

8 J McLaren, *The Law of Wills and Succession* (1894) para 1071.

9 R C Henderson, *The Principles of Vesting in the Law of Succession*, 2<sup>nd</sup> edn (1938) 346; *Duchess of Montrose v Stuart* (1887) 15 R (HL) 19 at 21 per Lord Watson.

10 McLaren, *Wills and Succession* para 1071.

11 *Aitken’s Trs v Aitken* 1927 SLT 308 at 313 per Lord Sands.

12 By contrast, C H Agnew of Lochnaw, *Crofting Law* (2000) 71 n 2 cites *Reid’s Trs* as authority for the proposition that a bequest of a crofting lease should be a specific bequest “because a bequest of the residue of the estate without further specification probably does not carry the lease to the residue beneficiary”.

13 1974 SC 158.

14 Para 10.

secondary literature,<sup>15</sup> no authority for the proposition that the bequest of a lease must be specific was cited; furthermore, the defender's argument was wholly circular. Given the accepted definition of residue, the tenant's interest in the lease must form part of it; if the bequest was invalid because it was not specific, it could not fall into intestacy but would simply enlarge the residue. Thus, by focusing on whether a bequest of residue could include a lease – and there was nothing in section 10(1) of the Act to suggest it could not – and on whether the bequest was framed in such as way as to leave no doubt about the intention of the testator to include his whole property within it, the only salient question was this: did the testator intend, or did he not intend, to bequeath the lease of the croft to his widow? Looked upon this way, it was self-evident that he had, since this was “the plain meaning and intent of Mr Gardner's will”.<sup>16</sup>

The fact that both *Kennedy* and *Reid's Trs* concerned agricultural rather than crofting tenancies, and that in both cases the leases involved *delectus personae* so that assignation was barred,<sup>17</sup> also formed part of the sheriff principal's reasons for distinguishing them. As he noted, there was no express exclusion of assignation in the crofting tenancy; and, unlike the case of agricultural tenancies, section 5(3) of the 1993 Act requires the approval of the Land Court if a tenant is to be deprived of any rights under a contract of lease. While agricultural tenancies usually exclude assignees and may include destinations to heirs,<sup>18</sup> crofting tenancies do not and, according to Gill, where there is no exclusion of assignees, “it is a matter of construction of the will whether a general bequest or a bequest of residue carries the lease”.<sup>19</sup>

### C. CONCLUSION

The decision in *Gardner v Curran* seems, therefore, to formulate a fairly clear principle: where an estate includes a tenant's interest under a lease and no specific bequest of the tenancy is made, a bequest of residue will be effective to carry the lease to the residuary legatee (provided that he or she is a member of the deceased's family as defined by the 1993 Act), except where assignees are expressly excluded or the lease is subject to a destination to heirs. Although likely to be of limited general application, the decision in this case is bound to give heart to the crofting community

15 D J MacCuish and D Flynn, *Crofting Law* (1990) para 7.02 states that “[w]here the bequest is ineffective the right to the tenancy of the croft falls to be dealt with as intestate estate. It would therefore appear that notwithstanding a will purporting to deal with the whole estate, where there is no valid bequest of the tenancy or that bequest fails, persons who would be entitled to share in intestate estate of the deceased are entitled to share the value of the tenancy no matter how the testator intended the tenancy to be dealt with.”

16 Para 30.

17 Although the common law position that applies to agricultural tenancies is virtually reproduced in the Crofters (Scotland) Act 1993 s 8.

18 Such a destination is not a special destination: *Reid's Trs v Macpherson* 1975 SLT 100; *Cormack v McIlldowie's Exrs* 1975 SC 161.

19 B Gill, *The Law of Agricultural Holdings in Scotland*, 3<sup>rd</sup> edn (1997) para 33.02.



post-Shucksmith,<sup>20</sup> if not the wider community of agricultural tenants whose position, as exemplified by the exceptions to the decision, remains far less favourable.

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## Cohabitation: *Chebotareva v Khandro*

In March 2008 Tatiana Chebotareva, a young student, brought the first case under the cohabitant's succession rights provisions of the Family Law (Scotland) Act 2006.<sup>1</sup> The 2006 Act introduces a set of rules in respect of *de facto* cohabitation<sup>2</sup> which defines "cohabitant"<sup>3</sup> and provides rights for such persons on the death, intestate, of one cohabitant.<sup>4</sup> A survivor who manages to prove cohabitation for the purposes of the 2006 Act is entitled to apply for a discretionary financial provision out of the deceased's estate within six months of the date of death.<sup>5</sup>

The English man with whom the Russian-born student had been cohabiting died intestate in London. At the time of instituting her civil claim in the sheriff court, the pursuer lived in the UK illegally.<sup>6</sup> The deceased and the pursuer had not concluded a cohabitation agreement. The jurisdiction of the court depended on the deceased having been habitually resident in Scotland at the time of his death.<sup>7</sup> Before an action may be raised in the sheriffdom in which the deceased was habitually resident,

20 Committee of Inquiry on Crofting: Final Report (2008).

1 *Chebotareva v Khandro* Stirling Sheriff Court, 28 March 2008. The sheriff's judgment is available at [http://www.scotcourts.gov.uk/opinions/A919\\_06.html](http://www.scotcourts.gov.uk/opinions/A919_06.html).

2 Cohabitation generally refers to a relationship that, potentially and depending on the legal system purporting to regulate that relationship, may have some legal consequences, even if the relationship is not formalised by legal ceremony or registration process. See generally Scottish Law Commission, Report on *Family Law* (Scot Law Com No 135, 1992; available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) paras 16.1 ff; J M Carruthers, "Scots rules of private international law concerning homosexual couples" 2006 (10) *Electronic Journal of Comparative Law* (available at <http://www.ejcl.org/103/art103-5.pdf>).

3 Either member of a couple consisting of a man and a woman who are (or were) living together as if they were husband and wife meets the definition of "cohabitant" contained in section 25(1).

4 Sections 25 and 29 respectively. See generally Carruthers (n 2) 13.

5 See generally Report on *Family Law* (n 2) paras 16.24-16.29; Scottish Office, *Improving Scottish Family Law* (1999; available at <http://www.scotland.gov.uk/library/documents-w8/isfl-00.htm>) para 4.3.5.

6 Ms Chebotareva attempted to seek asylum and also applied for residence in the UK. Her application was rejected and her appeal rights were exhausted on 7 Dec 2004. At the time of her claim, she had no formal entitlement to be in the UK but the Home Office had not moved to deport her.

7 Family Law (Scotland) Act 2006 s 29.

it must be clear that the deceased was domiciled in Scotland.<sup>8</sup> The nationality of the pursuer, the locations (England and Scotland respectively) of the properties that comprised the estate,<sup>9</sup> and the connecting factors which the court had to apply lent the application a private international law flavour.

However, a prior question received no attention: namely how the legal system that regulates the cohabitation relationship is to be identified. Cohabitants enjoy the freedom to enter into a contract relating to their property or financial rights and to choose a particular law to govern their contract.<sup>10</sup> If they do not choose, the law that governs their relationship must be identified by other means. A particular relationship may satisfy the definition of cohabitation in a Scottish statute, but this is not to say that Scots law governs the relationship and is the operational system of law. This note considers *Chebotareva v Khandro* against the background of the legislative framework for succession rights of cohabitants on intestacy in Scotland.

### A. THE DECISION

When the late James King died intestate and childless in 2006, he was fifty-five years old and left an estate worth £250,000. He was survived by Dorje Khandro, his younger sister (a practising Buddhist nun who lives in the foothills of the Himalayas), who inherited the entire estate by virtue of the Scottish law of intestate succession. Ms Chebotareva subsequently launched a civil action claiming £50,000 and a flat in Stirling, on the basis of cohabitation in Scotland during the year preceding Mr King's death.

Section 29(5)(b) of the 2006 Act contains a clear stipulation: jurisdiction lies within the sheriffdom in which the deceased was habitually resident at the date of death. To resolve the question of jurisdiction, the sheriff gave careful consideration to the factors that contradicted the pursuer's evidence concerning habitual residence. For instance, the court took note of the addresses which the deceased and the pursuer provided in order to register in the electoral register<sup>11</sup> and the rebate the deceased had claimed on council tax on the basis that the Stirling property was uninhabited.<sup>12</sup> The electricity accounts for this property over the period between February 2004 and October 2006 amounted to less than £30. The lack of electricity consumption weighed against the pursuer's account of events,<sup>13</sup> and indeed most of the pursuer's allegations were treated as falsehoods.<sup>14</sup>

8 The domicile of the deceased is the usual basis of jurisdiction in succession matters. Cf Report on *Family Law* (n 2) para 16.31. Because the domicile of the pursuer had no bearing on the matter, her illegal resident status was not raised in relation to this point.

9 The deceased acquired a property in Stirling in 1985 and owned a property in London.

10 Party autonomy is as reasonable a starting point in private international law as it is in other areas of private law. See C M V Clarkson and J Hill, *The Conflict of Laws*, 3<sup>rd</sup> edn (2006) 500; Report on *Family Law* (n 2) para 16.1.

11 Paras 7-11.

12 Para 4.

13 Para 20.

14 Paras 2, 4.

The surviving partner's right to bring an application for provision on intestacy depends on the deceased partner having been domiciled in Scotland at the time of his death. The Scottish Law Commission has made it clear that the requirement in respect of the deceased's domicile is not a matter pertaining to jurisdiction. It pertains to competence.<sup>15</sup> The sheriff pointed out that the deceased had a domicile of origin in England, and concluded that this domicile was unchanged prior to death on 30 May 2006.<sup>16</sup> Since the court remained unconvinced that the deceased had been domiciled in Scotland when he died and did not accept that it had jurisdiction to hear the case, the claim could not proceed any further. No consideration was given to the cohabitant's pleas in law. Because this was a preliminary proof before answer, the merits of her claim were not decided.

### B. A PRIVATE INTERNATIONAL LAW DIMENSION

The drafting of section 29 is not entirely clear.<sup>17</sup> An accurate understanding of its nature and effect in private international law helps bring to light some of the practical questions it leaves unanswered in international cases.

Section 29 limits the scope of its own application to those instances where the deceased was domiciled in Scotland. Because its spatial scope is statutorily expressed, the 2006 Act may be said to show a predilection for the unilateralist method.

Carruthers submits that the 2006 Act introduces significant new rules relating to cohabitation without enacting when those rules apply.<sup>18</sup> Arguably, however, multilateralist methodology implies that the court responds to the question "which law is to be applied?" as a basic starting point.<sup>19</sup> This response is normally contained in the form of conflict rules that select particular criteria which link, contact or connect the relationship in question with a particular system of law. The place where the deceased's properties are situated, or where the deceased had his domicile or habitual residence or his nationality at the time of death, would constitute such connecting factors. Having identified the rule, the pursuer would need to show that her relationship with the deceased was linked to and necessitated the application of Scots law in terms of that connecting factor. No multilateral conflict rule is evident in the 2006 Act. Section 29(1)(b)(i) supplies an answer to the question of when<sup>20</sup>

15 Scottish Law Commission, Discussion Paper on *Succession* (Scot Law Com DP No 136, 2007) para 4.67.

16 Paras 27-28.

17 Scottish Law Commission, Discussion Paper on *Succession* (n 15) para 4.67.

18 Carruthers (n 2) 14-15. She argues further that "[i]t is implicit that application may be made for the rights provided for in the 2006 Act whenever Scots law is the *lex causae*... Scots law would be the *lex causae* in relation to rights arising during the cohabitation where the cohabitation occurs/occurred in Scotland... [I]n respect of the rights of the survivor on the death intestate of the predeceaser, Scots law, if it is the *lex ultimi domicilii*, must be the *lex causae*." See generally J M Carruthers, "De facto cohabitation: the international private law dimension" (2008) 12 EdinLR 51.

19 Proposed by von Savigny and his followers. See generally C Roodt, "Reflections on theory, doctrine and method in choice of law" (2007) 40 *Comparative and International Law Journal of Southern Africa* 76 at 81ff, 97.

20 The word "where" as used in this section can be read as "when".

Scots law is intended to apply<sup>21</sup> as opposed to determining to which legal system the legal relationship belongs or where the weight of the contact lies. The unilateralist method does not require the judge to localise the legal relation at issue, the “seat” or the “centre of gravity” of the cohabitation relationship. Unilateral rules determine their own spatial scope, whether expressly or implicitly, regardless of the ordinary operation of the (multilateral) conflict rule of the forum. If they do so implicitly, judicial interpretation of the nature and purpose of the rule concerned becomes important. If the court were to identify the applicable law with reference to more universal precepts (as are reflected in a multilateral conflict rule), the limits of a particular domestic statute are less likely to be of concern.

### C. CONCLUSION

Soon after the enactment of the 2006 legislation, the Scottish Law Commission identified the need to fill the gap in respect of the jurisdiction of the Court of Session.<sup>22</sup> Scholars have also started to identify gaps remaining in Scots intestate succession law for cohabitants.<sup>23</sup> Since the requirement in the 2006 Act in respect of domicile pertains to competence, an interpretation that the lack of a Scottish domicile before death altogether precludes the exercise of judicial discretion may be considered reasonable. However, until the implications of party autonomy have been spelt out more clearly, the evolution of the law will be incomplete on this point. The 2006 Act gives no indication of whether the exercise of a judicial discretion would also be precluded in instances where cohabitants are domiciled outwith Scotland but enter into a contract in which they designate Scots law as the governing law, or make a will that designates Scots law as governing the succession rights of their partner. The multilateral approach in private international law methodology is amenable to recognising party choice as a connecting factor. Interpreting section 29 as a mandatory rule may, however, cause this potential to be overlooked in international cases.

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21 I.e. whenever the deceased with whom the cohabitant lived died domiciled in Scotland.

22 Discussion Paper on *Succession* (n 16) para 4.69.

23 Carruthers (n 2) at 15 asks, for instance, by which law the pursuer's legal capacity to attain to the status of cohabitant is to be decided.